"THIS CONSTITUTION": CONSTITUTIONAL INDEXICALS AS A BASIS FOR TEXTUALIST SEMI-ORIGINALISM

*Christopher R. Green**

Debate over proper methods of constitutional interpretation is interminable, in part because the Constitution seems not to tell us how it should be interpreted. I argue here that this appearance is misleading. The Constitution repeatedly refers to itself with the phrase "this Constitution," and claims to make itself supreme law of the land. Debates over what should be supreme for constitutional interpretation can be resolved if, but only if, we have a sufficiently-detailed understanding of what the Constitution is. I consider seven possibilities for what might be the interpretively-supreme "Constitution": (1) the original expected applications; (2) the original ultimate purposes; (3) the original textually-expressed meaning or Fregean sense (the alternative I favor); (4) a collection of evolving common law concepts; (5) a text expressing meaning by today's linguistic conventions; (6) a collection of moral concepts refined through an evolving tradition of moral philosophy; and (7) a collection of nonbinding recommendations. Resolving between these alternatives is possible if, but only if, we know that "this Constitution" means.

The phrase "this Constitution" on its own is not perfectly perspicuous; the "this Union" clause in Article IV shows that "this" can refer to entities that are neither composed of text nor fixed and unchanging. It is not immediately clear what event—what "constituting"—the word "Constitution" refers to. Canvassing in detail the indexical language of the federal and state Constitutions, I argue that the Constitution is composed of language whose meaning is fixed at the time of the Founding. The close textual relationship of "this Constitution" to forms of "here" and to "enumerate" and explicit references in state

* Assistant Professor of Law, University of Mississippi School of Law. Thanks to Bruce Ackerman, Akhil Amar, Kyle Duncan, and Michael Stokes Paulsen. Thanks to the Lamar Order of the University of Mississippi School of Law for their generous support. Please send comments to crgreen@olemiss.edu.

constitutions to "this Constitution" appearing on parchment, including bits of language, and doing things "expressly" all point toward a Constitution that is composed of language, and so to textualism. The use of "now," the distinction in the Preamble between "ourselves" and "our posterity," the specification in the Preamble and Article VII of ratifying conventions as the constitutional author, and the reference to "the time of the Adoption of this Constitution" all point toward a non-intergenerationally-authored constitution that speaks at the time of the Founding and is historically fixed.

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .[1]
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .[2]

INTRODUCTION

Academic ferment over originalism in its many varieties has persisted nonstop since Paul Brest invented the term in 1980.[3] The debate "abounds in troublesome arguments—endlessly debated, perennially plausible, perennially suspect."[4] This Article tackles the debate by means of a question explored most fully—but not conclusively resolved—by Walter F. Murphy and his coauthors: what *is* the

1 U.S. CONST. art. VI, cl. 2.

2 *Id.* art. VI, cl. 3.

3 *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) ("By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.").

4 DAVID LEWIS, *Anselm and Actuality*, *in* 1 PHILOSOPHICAL PAPERS 10, 10 (1983). Among the highlights of the past year were Jack M. Balkin's conversion to originalism and attempt to justify constitutional abortion rights on equal-citizenship originalist grounds in *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*] and *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Redemption*]; Mitchell N. Berman's sophisticated and careful attack on originalism in *Originalism is Bunk* (Working Paper, 2007), *available at* http://ssrn.com/abstract=1078933; and Lawrence B. Solum's massive, philosophically informed defense of a form of originalism in *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244.

Constitution.[5] Because the Supremacy Clause, quoted above, makes the Constitution "supreme," a resolution of the "What is the Constitution?" question will tell us, assuming that we agree with Article VI, what should be supreme in our constitutional interpretation.

This Article is the first attempt to comprehensively assess the Constitution's self-presentation on the basis of the uses of "this Constitution" and other words like "now," "we," and "here"—what philosophers of language call "indexicals"[6]—in state and federal constitutions. This Article greatly elaborates on an approach briefly suggested by Akhil Reed Amar,[7] Vesan Kesavan and Michael Paulsen,[8]

5 *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 84–85 (1st ed. 1986) ("[C]onstitutional interpretation—and thus also public policy—must continually grapple with the fundamental question of WHAT the Constitution includes. . . . [N]either judges nor commentators have solved the problem of convincingly justifying their answers . . . ."); *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 29 (1988) ("One must first decide . . . what 'the Constitution' is even prior to deciding what 'it' means. Does 'the Constitution' refer only to the specific text of the document written in 1787 and amended infrequently thereafter, or does it include as well a significant unwritten component derived from implicit assumptions of American political traditions?").

6 "Indexicals are linguistic expressions whose reference shifts from context to context: some paradigm examples are 'I', 'here', 'now', 'today', 'he', 'she', and 'that'." David Braun, *Indexicals*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2007), http://plato.stanford.edu/entries/indexicals. The term is due to David Kaplan, who distinguishes a term's *content* (a function from possible circumstances to extensions) from its *character* (a function from contexts to contents). *See* David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives and Other Indexicals*, *in* THEMES FROM KAPLAN 481, 505 (Joseph Almog et al. eds., 1989) ("Just as it was convenient to represent contents by functions from possible circumstances to extensions . . . so it is convenient to represent characters by functions from possible contexts to contents.").

7 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 285 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION] ("In a closing coda consisting of three short Articles featuring seven self-references to 'this Constitution' (words that had first appeared at the end of the Preamble), *the document* proclaimed itself America's 'supreme Law,' superior to all other legal texts . . . ." (emphasis added)); *id.* at 299 ("Whereas the Preamble first introduced the self-referential phrase 'this Constitution,' Article VI echoed that phrase four times in three short paragraphs, clarifying the precise status *of the document* vis-à-vis the old Confederation, the new federal government, and state governments." (emphasis added)); Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1657 (1997) ("In ordinary language we talk about *the* Constitution, that's what it says here on the cover of my handy-dandy pocket copy. It is a text with four proverbial corners. It actually *uses words like 'this Constitution' to describe itself as a document*." (second emphasis added)); Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 33 (2000) ("With these words [in the Supremacy Clause], *the Constitution* crowns itself king; judges and other officials must pledge allegiance to *the document*." (emphasis added)); *id.* at 34 ("[T]he document deems itself supreme."); *cf.* AKHIL REED AMAR, THE BILL

OF RIGHTS 296 (1998) (referring to "the precise words that eventually became the Supreme Law of the Land"). Note that Amar takes for granted that "this Constitution" refers to the document.

8 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003) ("[T]he Supremacy Clause . . . establishes the text of the document—'this Constitution,' a written document—as that which purports to be authoritative."); *id.* at 1128 ("The document itself . . . appears to prescribe textualism (in some form or another) as the proper mode of interpretation and application of the Constitution by those holding office under it."); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2049 (2006) ("[O]ur written Constitution directs that it is 'this Constitution'—a written document—that is supposed to be the supreme Law of the Land, not anything else."); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2741 n.96 (2003) ("[T]he Constitution itself (in Article VI's specification of '*[t]his* Constitution' as the supreme law of the land, and the nature of written constitutionalism generally), requires a methodology of original, objective-public-meaning textualism." (second alteration in original) (citation omitted)). Kesavan and Paulsen give no support for their view that "this Constitution" refers to the document; they consider objections to their argument, but none that questions the meaning they assign to "this" in the Supremacy Clause. *See* Kesavan & Paulsen, *supra*, at 1129 (dismissing other preferred methods of constitutional interpretation).

Paulsen has recently set out his view in more detail. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1301706. He gives a bit more elaboration to his claim that "this Constitution" refers to the document, putting emphasis on the term "constitution": "'This Constitution,' means, each time it is invoked, *the written document*. It refers to the text of the written Constitution of which the Enactment Clause, Article VI's Supreme Law Clause and Oath Clause, and Article VII's Establishment Clause are constitutive, *constituting* parts. The document specifies *the document* as authoritative." *Id.* (manuscript at 11). Because it is at least possible to use the term "constitution" to refer to non-textual practices, however, as in referring to the British Constitution, or to refer to temporally extended events, *see infra* Part II.C, more evidence seems required to establish conclusively that "this" in Article VI is a textual self-reference.

Paulsen makes two textual arguments in favor of an originalist brand of textualism, but neither of them seems compelling to me. He first argues that because Article V allows amendments to "this Constitution," we should take meaning as otherwise fixed: "Article V makes clear that to change the content of the supreme law—to change whatever 'this Constitution' refers to—involves changing the words of the text. By implication, the meaning of 'this Constitution' cannot change otherwise." Paulsen, *supra* (manuscript at 18). However, this inference does not seem ironclad. Discovering one moving part to the constitutional machinery does not indicate conclusively that there are no others, any more than it would with a car. The Founders might have thought that the Article V process of adding text gave the Constitution certain virtues of adaptability, but the evolution of common law or philosophical concepts supplied others. (In fact, because statutes also count as supreme law under Article VI, it is not actually true that "to change the content of the supreme law," Article V must be used.)

and Larry Solum,[9] who each contends that the "this Constitution" reference in the Supremacy Clause provides a basis for some form of constitutional textualism or originalism. I argue that the bare form of their argument is at best incomplete, because the "this Union" clauses show that a constitutional "this" can refer to entities that are neither composed of text nor historically confined to the time of the Founding. However, a closer examination of other instances of the phrase "this Constitution," both in state constitutions and elsewhere in the Federal Constitution, makes clear that the phrase is a historically confined textual self-reference. A textualist semi-originalism is the result.

Part I first sets out seven possible entities that could conceivably serve as an interpretively paramount "Constitution" in keeping with various positions on interpretation that have been proposed—that is, seven possible "constitutional ontologies." The first three of these entities are confined to the time of the Founding. We might take as interpretively supreme, and hence as "the Constitution," either (1) the original ultimate constitutional purposes or rationale, (2) the original set of tangible expected constitutional applications, or (3) the meaning originally expressed in the constitutional text, which might diverge from the Founders' purposes and from the applications they

---

Second, Paulsen points to what he calls the "Done Deal" clause at the conclusion of the constitutional text: "Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." U.S. CONST. art VII; Paulsen, *supra* (manuscript at 19). However, as Paulsen himself recognizes a moment later in a footnote, this language does not conclusively establish September 17, 1787 as the date at which "this Constitution" acts, because the Preamble and Article VII make the time of ratification the time at which "this Constitution" is "established." *See id.* (manuscript at 19 n.57); *see also infra* Part II.D.1 (discussing the "We the People" language of the Preamble). It all depends on what, exactly, was "done" on September 17. Paulsen thinks that meaning was once and for all attached to the constitutional text (and I agree, though I think more evidence is required). But, based just on the word "done," September 17 might have been instead, for instance, the start of an intergenerational process of adhering to a common law or philosophical concept. We need more evidence to exclude that possibility.

9 Solum, *supra* note 4 (manuscript at 7) ("The indexical article 'this' in the phrase 'this Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby' makes a contribution to the meaning of the clause. The use of 'this' in 'this constitution' points to the semantic content of the document itself—that is to the Constitution of 1789."); *id.* (manuscript at 135) ("What does 'this Constitution' refer to? The use of the indexical article 'this' points the reader to the Constitution of 1789. Because the Supremacy Clause asserts that the Constitution of 1789 is law, it must be referring to the semantic content of the Constitution."). Solum does not give further explanation for why he reads "this" as pointing to historically confined semantic content.

expected the constitutional provisions to produce. Another three possible interpretively paramount candidates for "the Constitution" might be seen as forms of textualism, but without a historical anchor. We might take the textual categories either (1) as expressing moral principles whose precise content can only be understood through a tradition of moral reflection, (2) as a contemporary coordination device on the basis of the contemporary meaning of its language, or (3) as common law concepts, elaborated by judges only over the course of generations. Or, finally, departing both from a historically situated and a textual Constitution, we might understand the Constitution as nonbinding, simply offering reasons that can be overridden by sufficiently important contrary considerations.

After sketching these seven possible constitutional ontologies, I argue that each of these understandings of the nature of the Constitution could have been made explicit in a supremacy clause. Because of this contingency in constitutional ontology, reasoning about the function of a written constitution, or the method of interpretation that would be normatively most attractive, goes astray to the extent that it departs from whatever constitutional ontology is expressed in our *actual* Supremacy Clause. Functional and normative arguments are only relevant to an understanding of the nature of the actual Constitution to the extent that views about the function of a constitution or the norms that govern desirable results were, in fact, embodied in our actual "this Constitution" of Article VI.

Part II turns to the substance of constitutional indexicals as a basis for proper constitutional ontology rooted in Article VI. I argue that the bare form of the Amar-Kesavan-Paulsen-Solum argument is unsuccessful, because the word "this" is not inevitably a historical or textual self-reference; Article IV refers to "this Union,"[10] an entity which can grow or shrink through the generations and which is not composed of language. If "this Constitution" in Article VI were our only guide, it might be possible to consider the Constitution as nontextual or of intergenerational extent in time. However, an examination of the full set of uses of the term "this Constitution" in the Federal Constitution, together with other constitutional indexicals, can resolve the meaning of "this Constitution" in the Supremacy Clause. A full survey of this evidence supports an understanding of "this Constitution" as a historical and textual self-reference, and taking the Constitution as binding. Article VI's "shall be bound"[11] language indicates plainly that the Constitution presents itself as a binding obligation,

10 U.S. CONST. art. IV, §§ 3–4.

11 *Id.* art. VI, cl. 2.

not merely as a useful source of guidance or a method of supplying coordination, and a continuous tradition of American political culture from the Founding to today views officeholders as satisfying Article VI with their oaths, not swearing allegiance to something else. The Necessary and Proper Clause links "foregoing"[12] grants of power with the grants of power elsewhere in "this Constitution," while other clauses use "enumeration" in reference to "the Constitution,"[13] and state constitutions speak of "this Constitution" being engrossed on parchment, as containing language, and as doing things "expressly," all of which fit with a textual "this Constitution." The use of "now"[14] to refer to the time of the Founding, the careful distinction between "ourselves" and "our Posterity" in the Preamble,[15] and the way that the Preamble and Article VII make the ratifying conventions the constitutional author all point toward a historically situated Constitution that is spoken and receives meaning at the time of the Founding, not intergenerationally or today.

Part III considers two objections to the suggestion that the Constitution contains sufficient information to tell us what should be interpretively supreme. First I consider the argument that Article VI is redundant and so cannot embed a constitutional ontology. Even if Article VI is redundant, it can still give us explicit guidance about what exactly should be interpretively supreme. Second, I address the frequently suggested complaint of circularity: the claim that the Constitution cannot explain its own nature, or establish criteria for its own interpretation, simply by its own *ipse dixit*. I consider several examples of entities that can explain their own nature without any problem of circularity. It is true that Article VI's assertion of authority for "this Constitution" must be accepted in order to be effective, but officeholders today do in fact understand themselves as binding themselves in the way that Article VI prescribes, frequently invoking Article VI and claiming to follow it.

I. THE "WHAT IS THE CONSTITUTION" ISSUE: SEVEN POSSIBLE ANSWERS

I will frame my discussion about the nature of proper interpretation by discussing the nature of the Constitution itself. Without an understanding of what the Constitution *is*, we will inevitably be at a loss in deciding how to interpret it. On the other hand, establishing

12 *Id.* art. I, § 8, cl. 18.
13 *Id.* amend. IX.
14 *Id.* art. I, § 9, cl. 1.
15 *Id.* pmbl.

the nature of the Constitution itself will give us a touchstone for assessing interpretations.

Historical controversies about interpretation were often put in terms of the nature of the Constitution. For instance, James Madison's 1824 comments on interpretation begin with his statement about which sort of entity can legitimately claim to *be* the Constitution. He wrote to Henry Lee, "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. *In that sense alone it is the legitimate Constitution.*"[16] Frederick Douglass' 1860 Glasgow speech likewise considered the "What is the Constitution" question as the only proper foundation to a discussion of constitutional interpretation:

> Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain *what the Constitution itself is*. . . . What, then, is the Constitution? I will tell you. . . . It is not even like the British Constitution, which is made up of enactments of Parliament, decisions of Courts, and the established usages of the Government. The American Constitution is a written instrument full and complete in itself. . . . It is a great national enactment done by the people, and can only be altered, amended, or added to by the people. . . . . . I repeat, the paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution.[17]

Douglass thus founds his view of interpretation on his view that the Constitution itself consists of the historically fixed, unchanging text. Justice Patterson likewise remarked on the nature of a constitution in 1795, considering the possible conflict of a Pennsylvania statute with the Pennsylvania Constitution:

> What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. . . .
>
> . . . .
>
> The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing

16 Letter from James Madison to Henry Lee (June 25, 1824), *in* 9 THE WRITINGS OF JAMES MADISON 190, 191 (Gaillard Hunt ed., 1910) (emphasis added).

17 Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 468–69 (Philip S. Foner ed., 1950).

> interests, and the violence of contending parties, it remains firm and immoveable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. . . . [I]f a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the force of repugnance. . . . [I]n such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.[18]

On the other hand, Felix Frankfurter ties his evolutionary views about proper interpretation to a view about the evolutionary nature of the Constitution: "If the Thames is 'liquid history,' the Constitution of the United States is most significantly not a document but a stream of history. And the Supreme Court has directed that stream."[19] David A. Strauss likewise frames his view of common law constitutional interpretation as a view about what the Constitution is:

> The Constitution of the United States is a document drafted in 1787, together with the amendments that have been adopted from time to time since then. But in practice the Constitution of the United States is much more than that, and often much different from that. . . . [W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires. . . .
>
> . . . .
>
> . . . [T]he common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by "we the people," . . . best explains, and best justifies, American constitutional law today.[20]

If, like Article VI, we think that the Constitution is supreme, we can translate interpretive controversy—that is, controversy over the proper ultimate interpretive touchstone—into ontological controversy—that is, controversy over what the Constitution *is*. Textualists who say that the text should be interpretively paramount, for instance, implicitly define "the Constitution" as the constitutional text. Those who advocate a common law method of constitutional interpretation, in which the subsequent interpretations of judges are as important as

---

18 Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308–09 (C.C.D. Pa. 1795).

19 FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 2 (1937).

20 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877, 879 (1996).

the text or the history of the adoption of a provision, implicitly define "the Constitution" as a temporally extended common law concept, authored though an intergenerational partnership.

In this Part, I will first set out a menu of possible definitions of "the Constitution" that would fit with various prominent theories of constitutional interpretation on offer, and then argue that several methods of deciding between these definitions are inferior to a direct analysis of "this Constitution" in Article VI. Two preliminary caveats are in order, however.

First, I aim to give a survey of the most prominent theories of what should be supreme in constitutional interpretation. Other material may be relevant to constitutional interpretation, however, even if it is not the supreme touchstone. Those who think the text is paramount, for instance, can still consult the original purpose of a provision as a guide, and vice versa. Put another way, we can distinguish what interpreters find authoritative from what they find persuasive. The entity given interpretive supremacy has authority, but other entities will still shed at least reflected light on whatever *is* interpretively supreme.[21] For instance, elsewhere I explain my theory that the original, textually expressed sense of constitutional language is interpretively supreme, but the original expected applications and later judicial interpretations should still receive some deference.[22]

Second, my focus is constitutional interpretation, not constitutional law as such. Recent thinkers on originalism, most prominently Keith Whittington, have usefully distinguished constitutional interpre-

21 My focus on what is interpretively supreme explains my neglect of pluralist theories like that in PHILIP BOBBITT, CONSTITUTIONAL FATE (1982), or Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185. Bobbitt gives an admirably clear exposition of six modes of constitutional discourse (text, history, structure, doctrine, prudence, and ethics), but no explanation of how to choose between them. As a result, he either lacks a theory of interpretive supremacy—and thus lacks anything that could be a supreme "this Constitution"—or implicitly adopts some sort of common law constitution according to which contemporary interpreters are themselves supreme in making decisions between the best arguments in the various modes. Because others more explicitly advocate a common law constitution, I do not consider pluralism separately.

22 *See* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 591–92 (2006) ("[A]ssessments of constitutional reference, 'while not controlling upon [later interpreters of the Constitution] by reason of their authority, do constitute a body of experience and informed judgment to which [later interpreters] may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" (alterations in original) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

tation from constitutional construction—that is, as Larry Solum describes it, "activity directed at resolving vagueness, ambiguity, gaps, and contradictions and at constitutional implicature."[23] Much of constitutional law is construction, not interpretation. In attempting only to consider what should be supreme when we interpret the Constitution, I am not attempting to delimit the proper occasions for constitutional interpretation. For instance, is a court considering a piece of legislation that may be unconstitutional in a position to make its own interpretation of the Constitution effective?[24] Are presidents or citizens considering judicial action that may be unconstitutional in a similar position to interpret the Constitution for themselves?[25] What about courts considering earlier, possibly unconstitutional actions by the same court?[26] Or lower courts deciding cases in the face of possibly unconstitutional action by higher courts, or lower-level executive officials acting in the face of possibly unconstitutional action by the President? I answer none of these questions.[27] Rather, in considering what should be supreme in the process of interpretation, I am assuming that the interpreter is, in fact, in a position to interpret the Constitution for herself. Article VI may also be relevant to resolving when

23 Solum, *supra* note 4 (manuscript at 67); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 9 (1999) ("The defining features of constitutional constructions are that they resolve textual indeterminacies and that they address constitutional subject matter."). This book is the companion to KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999).

24 *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179–80 (1803) ("[T]he framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislative."), *with* Eakin v. Raub, 12 Serg. & Rawle 330, 347 (Pa. 1825) (Gibson, J., dissenting) ("The judiciary . . . cannot take cognizance of a collision between law and the constitution.").

25 *See generally* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

26 *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994) (arguing that the President has co-equal power with the judicial and legislative branches to interpret the Constitution and, moreover, is not bound by the other branches' interpretation of executive power).

27 Michael Dorf argues (in response to my prompting) that the concern of obedience to unconstitutional judicial action is an argument against constitutional ontology rooted in Article VI. *See* Posting of Michael Dorf to Dorf on Law, http://www.michaeldorf.org/2008/06/and-now-for-something-completely-same.html (June 13, 2008, 09:35 EST) (Dorf comment at 00:16 EST). However, as I explained in a later comment there, and reiterate in this Article, distinguishing the proper *occasions* of constitutional interpretation from the proper method of constitutional interpretation can avoid Dorf's *reductio ad* departmentalism. *See id.* (Green comment at 16:02 EST). We can follow Article VI's guidance about *what* should be interpretively supreme without settling *when* we have power to interpret it for ourselves.

interpreters have the power to make their interpretations effective, but I leave those questions for another day.

A. Three Historically Bound Definitions

Turning, then, to the seven views on what should be interpretively supreme, I first briefly set out three views of the Constitution that confine it to the Founding: the original purposes or reasons for the Constitution's provisions, the original applications or tangible expected results of the Constitution, and the original sense expressed in the Constitution's text (the view I favor).[28]

1. The Constitution as Original Ultimate Purposes

Justice Breyer has suggested that the Constitution's purposes, rather than its language or the expectations of its authors, should be dominant in constitutional interpretation: "My discussion sees individual constitutional provisions as embodying certain basic purposes, often expressed in highly general terms. . . . [A]n understanding of, and focus upon, those purposes will help a judge better to understand and to apply those general purposes [of the whole Constitution] and to apply specific provisions."[29] Justice Goldberg put a similar position in terms of the Article VI oath in 1964: "Our sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers."[30] The oath to support the Constitution is, for Goldberg, an oath to effectuate the Founders' purposes. Andrew Koppelman argues that purposive analysis is required of any originalist interpretation of the Constitution. He criticizes Chief Justice Rehnquist and Justices Scalia and Thomas for being "indifferent

28 One somewhat tendentious way to think of these three views is that they take the history of the Constitution at three levels of generality—too high (purposes), too low (applications), and just right (the level stated in the text).

29 STEPHEN BREYER, ACTIVE LIBERTY 115 (2005); *see also id.* at 115–16 (distinguishing his theory of "reliance upon purposes (particularly abstractly stated purposes)" from those who "focus primarily upon text, upon the Framers' original expectations, narrowly conceived, and upon historical tradition"); *id.* at 8 ("Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. These differences of emphasis matter . . . ."); *id.* at 121 (approving of cases that interpret the Establishment Clause "to implement the basic value that the Framers wrote the clause to protect"); *id.* at 124 ("[M]y opinions [in the ten-commandments cases] sought to identify a critical value underlying the Religion Clauses. They considered how that value applied in modern-day America.").

30 Bell v. Maryland, 378 U.S. 226, 288–89 (1964) (Goldberg, J., concurring).

to the original purposes of [the Establishment] clause."[31] He writes concerning how to resolve interpretive controversies:

> The proper originalist way to undertake this inquiry would be to look at the ideas of the framers and ratifiers of the Constitution in order to discern why establishment of religion was regarded as a bad thing, and what principle condemned it. The interpreter would then try to figure out how that principle applied to the case being decided.[32]

The purpose of a constitutional provision in the eyes of the Framers—why they adopted a particular provision—is paramount for Koppelman.[33]

A search for the reasons the Founders adopted a particular provision may, of course, produce more than one answer. The ratifiers and Framers may have disagreed. Or to take Koppelman's example of the Establishment Clause, different denominations might have opposed a

---

31 Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 2), *available at* http://ssrn.com/abstract=1125482.

32 *Id.*

33 For criticism of an emphasis of making original purposes paramount, rather than the text, see Giles v. California, 128 S. Ct. 2678, 2692 (2008) ("It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values."); Indiana v. Edwards, 128 S. Ct. 2379, 2392 (2008) (Scalia, J., dissenting) ("We have rejected an approach to individual liberties that 'abstracts from the right to its purposes, and then eliminates the right.'" (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006))); United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006) ("[T]he purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 19–20 (2006) ("[O]ne very popular [alternative to originalism] can be called the 'underlying principles' approach. We discern from the text the deeper underlying principles that underlie its particular injunctions. We then appeal to these principles to limit the scope of the text or ignore it altogether. Those who employ this approach can claim that they are still enforcing the Constitution, in the sense that they are implementing the principles for which it stands. . . . [P]retty much anyone can play this game to reach virtually any result . . . . [T]he real arbiters of government power are those in the courts who discern the underlying principles. Everything then depends on who the Justices are, rather than on what the Constitution says."). Justice Scalia has said for the Court that even textually stated purposes cannot trump other parts of the constitutional text. *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008) ("[I]t may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

federal establishment for different reasons. Baptists, Congregationalists, and Episcopalians might each have favored a federal establishment, if it were theologically *simpatico*, but agreed to oppose one out of fear that it would not be.[34] In general, any provision that represents a compromise between two sides will not have a single purpose. Consider a contract to sell a car for $2000. What is the purpose of setting the price at that amount? The seller's purpose, obviously, is to get as much as possible, but the buyer's purpose is to pay as little as possible. It would be foolish to say that interpreting the meaning of "$2000" requires any analysis of the parties' purposes, as opposed to the meaning of their words.

2. The Constitution as Collection of Original Applications

Raoul Berger has been the most prominent advocate of the view that the Constitution requires adherence to the specific applications expected by the Founders and nothing else. Berger begins with dictum from Charles Sumner: "Every Constitution embodies the principles of its framers. It is a transcript of their minds."[35] Berger then claims, "A 'transcript of their minds' was left by the framers in the debates of the 39th Congress."[36] By denouncing as a modification of the Constitution any change from the way in which the Congress of 1866 would have resolved particular issues, Berger claims that the "transcript of their minds" in the Congressional Globe itself deserves the deference owed to the Constitution.[37]

There are considerable difficulties in explaining exactly how an original-applications theory of the Constitution would work. For example, the 1787 Founders did not have any expectations about the application of the Constitution to Mississippi.[38] One semi-answer to this difficulty would be that the Constitution is not limited to applica-

34 For a similar story about why the federal Religious Test Clause was supported by many who supported state-level religious tests, see Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 679–713 (1987).

35 RAOUL BERGER, GOVERNMENT BY JUDICIARY 410 (2d ed. 1997) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866)).

36 *Id.*

37 Berger's position is distinct from Sumner's point. Sumner said that the Constitution itself was a transcript of the Framers' minds, but Berger says that the transcript of the Framers' minds—the Congressional Globe—is entitled to the deference due to the Constitution.

38 Gerard Bradley makes this point. *See* Gerard V. Bradley, *The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417, 418. Justice Scalia's opinion for the Court in *Heller* likewise notes that the First and Fourth Amendments, and so the Second Amendment, are construed to encompass technological changes:

tions the Founders actually considered, but also applies to the judgments of constitutionality the Founders would have made, had they thought about the question. Thus modified, Berger's theory seems to be a WWFD theory—What Would the Founders Do?[39]

Justice Scalia's opinion in the recent cases on the public display of the Ten Commandments suggests that the Founders' original applications are binding. He relied on the original practices of the Founders to argue that nonsectarian, generically monotheistic public acknowledgements of God are constitutional. He explained:

> It is no answer for JUSTICE STEVENS to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." The Establishment Clause, upon which JUSTICE STEVENS would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?[40]

The Founders' practices "show what [the Constitution] meant," apparently conclusively. It might be possible to read Scalia as saying only that the Founders' practices are entitled to a heavy presumption in favor of their constitutionality, but not quite a fully binding one. Scalia would then, however, need to explain exactly when and how that presumption could be overcome, and why it is not overcome in particular cases.[41]

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 128 S. Ct. at 2791–92 (citations omitted).

39 *See, e.g.*, RICHARD BROOKHISER, WHAT WOULD THE FOUNDERS DO? (2006); Robert Justin Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 829 n.67 (1990) ("[O]riginalism is essentially an historicist methodology. It asks what the actual historical actors would choose."). Brookhiser's book is, of course, not confined to issues of constitutional interpretation, and on at least one point related to constitutional law he shifts his locution to ask "What Did the Founders *Mean* by Federalism?" BROOKHISER, *supra*, at 50 (emphasis added).

40 McCreary County v. ACLU of Ky., 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) (citation omitted) (quoting Van Orden v. Perry, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting)).

41 Likewise, Justices Scalia and Thomas' defense of the constitutionality of the death penalty in *Baze v. Rees*, 128 S. Ct. 1520 (2008), depends on the Founder's

presuppositions about the constitutionality of the death penalty. They each rely heavily on the fact that the Founders enacted death penalties and that the Fifth Amendment presupposes that the government may sometimes take away life. Scalia says:

> [T]he very text of the document recognizes that the death penalty is a permissible legislative choice. The Fifth Amendment expressly requires a presentment or indictment of a grand jury to hold a person to answer for 'a capital, or otherwise infamous crime,' and prohibits deprivation of 'life' without due process of law. The same Congress that proposed the Eighth Amendment also . . . made several offenses punishable by death.

Id. at 1552 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. amend. V). Justice Thomas likewise says, "[I]t is clear that the Eighth Amendment does not prohibit the death penalty. That is evident both from the ubiquity of the death penalty in the founding era and from the Constitution's express provision for capital punishment." *Id.* at 1556 (Thomas, J., concurring in the judgment) (citations omitted). It might be possible to construe Scalia and Thomas as saying that the First Congress' actions are entitled to a heavy presumption in their favor, and in lieu of some reason to think otherwise, the Fifth Amendment's presupposition of the constitutionality of the death penalty should be deemed correct. However, their arguments suggest that it is not even *possible* that the Founders could have been mistaken about the constitutionality of the death penalty. That would make sense only if the Constitution were a collection of original applications to which interpreters are bound. If it were even theoretically possible for the Founders to be in error about the constitutionality of particular practices, or for such constitutionality ever to change over time, then Scalia and Thomas need additional argument to explain why this is not such a possible case. In fairness to Justice Thomas, he does present a textual argument based on the meaning of the word "cruel." *See id.* at 1558 (citing dictionary definitions). However, this argument seems limited to his assessment of particular execution methods, not his position that the death penalty itself is constitutional. Thomas does not explain the relationship between his argument from original practices and his argument from the constitutional text.

Is the argument about the Founders' practices stronger because those practices are textually presupposed? Put another way, is there a sensible variant of originalism that puts textually embodied expectations on a plane higher than other original expectations? It seems not, because factual error could infect textual presuppositions just as they could infect other expectations of the Founders. For instance, the text of the Constitution presupposes that North Carolina's population was smaller than Maryland's, but that factual assumption was wrong. *Compare* U.S. CONST. art. I, § 2 (providing that, until census, Maryland receives six representatives and North Carolina five), *with* RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793) (showing Maryland has 319,728 inhabitants, including 103,036 slaves, while North Carolina has 393,751 inhabitants, including 100,572 slaves), *and* JOINT COMM. ON PRINTING, U.S. CONGRESS, OFFICIAL CONGRESSIONAL DIRECTORY, 110TH CONGRESS, 2007–2008, at 549 (2007) (showing that in the Third Congress, the first after the census, Maryland had eight representatives and North Carolina ten). Given that the text, like the Founders themselves, can make mistakes about the reference-yielding facts, the mere fact that the death penalty is presupposed as constitutional textually adds little to the fact that the death penalty was presupposed as constitutional by the Founders.

3. The Constitution as Historically Situated, Sense-Expressing Text

I now turn to the view I favor. Elsewhere, I have explained[42] and applied[43] a view of the Constitution that aims to be historically bound, but also textualist. Because I allow some departures from the Founders' expectations about the tangible effect of a provision, I call my position textualist semi-originalism. It pictures a "zombie" Constitution: part "living" (potentially changing) and part "dead" (fixed). Textualist semi-originalism views the Constitution as fixed at the time of the Founding, but only insofar as constitutional meaning is expressed in the constitutional text, reducible neither to original expected applications nor to original ultimate purposes.

To distinguish what is conveyed in the text of the Constitution from the Constitution's expected applications, I draw on a long tradition in the philosophy of language beginning most prominently with the great logician Gottlob Frege[44] and continuing to such contemporary philosophers as David Kaplan[45] and David Chalmers.[46] Frege distinguished an expression's linguistically expressed sense (German *Sinn*) from its tangible reference (German *Bedeutung*)—the object in the world such language picks out. Frege summarizes the distinction: "A proper name (word, sign, sign combination, expression) *expresses* its sense, *refers to* or *designates* its referent. By means of a sign we express its sense and designate its referent."[47] Because this view takes the original *Sinn* of constitutional language as binding, but not the original *Bedeutung*, I call this view the Theory of Original Sinn.

The basic idea behind Frege's distinction is very simple. Building cars does not change *sense* of the word "car," because the word "car"

42 *See* Green, *supra* note 22, at 559 ("[D]istinctions of long standing in the philosophy of language can present a compelling distinction between which of the Constitution's attributes change and which do not.").

43 *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. (forthcoming 2009), *available at* http://ssrn.com/abstract=110021.

44 *See, e.g.*, Gottlob Frege, *On Sense and Reference*, 57 PHIL. REV. 209 (Max Black trans., 1948) (translating Gottlob Frege, *Über Sinn und Bedeutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892)).

45 *See, e.g.*, David Kaplan, *Afterthoughts*, *in* THEMES FROM KAPLAN 565 (Joseph Almog et al. eds., 1989); Kaplan, *supra* note 6.

46 *See, e.g.*, David J. Chalmers, *On Sense and Intension*, 16 PHIL. PERSP. 135 (2002).

47 Frege, *supra* note 44, at 214. The word "meaning" seems usually to convey the idea of sense, but it can also convey the idea of reference. If we speak, for instance, of the "tangible meaning" of an expression, we are speaking of the particular objects in the world that an expression designates.

expresses the same thing even though more and more cars exist. Building cars does, however, change the *reference* of the word "car," because it creates more objects in the world covered by the word "car." If, then, we were bound by a constitutional provision that required us to do something with "cars" (say, to destroy all the fuel-inefficient ones) we would have to find out the facts of the world—that is, find all the cars in the world—in order to determine the tangible effect of that provision. Knowing the sense conveyed by the term "car" is not enough to know constitutional outcomes; we must also know the facts about the world. If, then, we are merely bound by the sense expressed in the constitutional text, the facts about the world offer a way in which our assessments of constitutional outcomes can properly differ from the Founders' assessments.

Those like Berger who are concerned exclusively with the Founders' tangible expectations about the effect of a constitutional provision, then, are thus concerned with the *reference* of constitutional language. Berger himself, when confronted with the sense-reference distinction by Hugo Adam Bedau, replied by claiming that "the Founders clearly tied 'meaning' to 'reference.'"[48] Berger thereby very helpfully situated his own theory with respect to a theory like mine that would put primacy on the constitutional text. What matters for Berger is not what the constitutional text says, but the specific applications the Founders understood it to have—Fregean reference.

Frege was neither the first nor the last to draw this distinction. Earlier, John Stuart Mill had distinguished "connotation" (essentially Fregean sense) from "denotation" (Fregean reference).[49] Later philosophers of language building on Frege's basic view have similarly distinguished "intension" (a technical term with an "s") from "extension." A word's extension is its reference—the tangible object the

48 Raoul Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO ST. L.J. 863, 872–73 (1984) (replying to the invocation of Frege in Hugo Adam Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1161–62 (1983)).

49 1 JOHN STUART MILL, A SYSTEM OF LOGIC 30–40 (J.M. Robson ed., Univ. of Toronto Press 1973) (1843). Some have found something like the sense-reference distinction in Plato, *see* George Rudebusch, *Plato on Sense and Reference*, 94 MIND 526, 526 (1985) ("It seems to me undisputable that Plato did understand the general form of Frege's solution and, understanding it, rejected it."), Aristotle, *see* Keith Allan, *Aristotle's Footprints in the Linguist's Garden*, 26 LANGUAGE SCI. 317, 329–30 (2004) ("Aristotle distinguishes sense from reference two millennia before Frege (1892) refined the distinction."), and many others, *see* RICHARD L. MENDELSOHN, THE PHILOSOPHY OF GOTTLOB FREGE, at xv (2005) (listing the Stoics, William of Ockham, and Arnauld, as well as Mill).

word picks out in the world.[50] An expression's intension, determined by its sense, is a function from possibilities to extensions: that is, a relation that associates possible worlds as input with tangible objects as output.[51] Just as we must know the facts about the world in order to know the reference of constitutional language, we must know the facts about the world in order to know which possible world to plug into our constitutional intension and thereby produce our constitutional extension.

The textualist semi-originalism of the Theory of Original Sinn is founded on the possibility that the Founders could be wrong or ignorant about the constitutional outcomes today because the Founders could be wrong or ignorant about the facts that characterize our world. We must interrogate Founders' assessments of the tangible effect of their provisions to see if those assessments depend on errors about the reference-yielding facts, or on facts that have changed.[52] *Dred Scott*[53] notwithstanding, the Framers were not "incapable of asserting principles inconsistent with those on which they were acting."[54] The Founders were eminently fallible and capable of misunderstanding the facts on which the application of a constitutional provision would depend. If only the historic, textually expressed sense is interpretively binding, and not the Founders' specific applications, we must attempt to work backward from the Framers' applications to discern the facts in virtue of which the constitutional language

50 *See* Chalmers, *supra* note 46, at 135.

51 *See id.* at 145 ("[A]n expression's sense might be seen as an *intension*: a function from possibilities to extensions. This function takes a given possibility, and associates it with an extension relative to that possibility."); Jerrold J. Katz, *The Problem in Twentieth-Century Philosophy*, 95 J. PHIL. 547, 553 (1998) ("Frege defined sense as the determiner of reference, and the subsequent Carnapian doctrine on which sense is a function from possible worlds to extensions is only a slight modification that brings Frege's definition in line with the modal expansion of the universe."); William G. Lycan, *What is the "Subjectivity" of the Mental*, 4 PHIL. PERSP. 109, 113 (1990) ("Each concept or Fregean intension can be represented in the standard way as a function from possible worlds to extensions.").

52 For an instance of such an interrogation of James Wilson's 1866 view that even the broad language of an early version of the Civil Rights Act of 1866 would not require school desegregation, see Green, *supra* note 22, at 606–08 (showing how Wilson's position was based on his view of which privileges were actually afforded to all citizens, and arguing that we are entitled to disagree with Wilson on that factual question).

53 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

54 *Id.* at 410.

had those applications.[55] Only then can we can find the intensional function from possibilities to outcomes which, when applied to the facts as the Framers saw them, produces the applications as the Framers saw them. The Founders' textually expressed intensional function is interpretively binding, but not necessarily the applications it produces.

The sense-reference distinction and its kin are closely related to the distinction between analytic and synthetic judgments. Analytic judgments are true or false solely in terms of the meaning (the Fregean sense) of its terms—they are true "by definition."[56] The standard example is "all bachelors are unmarried," which is true just because of what "bachelors" and "unmarried" mean. Synthetic judgments, however, are true or false partly in virtue of how the world is.[57] One example is "there are fifteen bachelors in this room," whose truth depends on the state of this room, not just the word "bachelors." If we are bound, then, by the sense that the Founders used the constitutional language to express, we are bound by their analytic constitutional judgments—that is, the definitions they would supply to the language they enacted—but we are not bound by the Founders' synthetic constitutional judgments—that is, judgments about constitutionality that depend in part on the facts about the world.[58]

The Supreme Court's 1926 explanation of the consistency of changing constitutional applications with unchanging constitutional meaning hits a note very similar to the Theory of Original Sinn:

> [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . . .[59]

The High Court of Australia explained in 1959, using Mill's terms:

---

55 *Cf.* MORRIS R. COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC 31 (1962) ("*Why* a term is applied to a set of objects is indicated by its intension; the set of objects *to which* it is applicable constitutes its extension.").

56 Georges Rey, *The Analytic/Synthetic Distinction*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 6, at http://plato.stanford.edu/entries/analytic-synthetic/.

57 *Id.*

58 Quine's attacks on the analytic-synthetic distinction are therefore an attack on the Fregean tradition. For a response, see generally H.P. Grice & P.F. Strawson, *In Defense of a Dogma*, 65 PHIL. REV. 141 (1956) (responding to Professor Quine's rejection of the analytic-synthetic distinction).

59 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

> We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.[60]

B. Other Distinctions: Intent v. Understanding v. Meaning, Objective v. Subjective, and Ratifiers v. Framers

Before considering other ways to define "the Constitution," some reflection on the three theories of a Constitution confined to the time of the Founding will be helpful. The trichotomy marked above among historically rooted theories of the Constitution—that between original ultimate purposes, original application, and original textually expressed sense—seems more felicitous than the distinction between "original intent," "original understanding," and "original meaning."[61] Any of my three historically confined constitutional ontologies could be put in terms of intent, understanding, or meaning. We can speak of the ultimate purpose the Founders originally intended to pursue, or the sense originally intended to be expressed by the text, or the originally intended applications. We can likewise speak of originally understood ultimate purposes, or of originally understood applications, or of the sense originally understood to be expressed by the text. Finally, we can speak of the Constitution's ultimate meaning (its ultimate goal and purpose), its tangible, concrete meaning (its application), or its textually expressed meaning (its Fregean sense).[62]

---

60 *See Ex parte* Prof'l Eng'rs' Ass'n (1959) 107 C.L.R. 208, 267.

61 *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 143–60 (1990) (explaining Bork's theory in a chapter entitled "The Original Understanding"); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 6 (1988) (providing an argument for original intent, a view which understands the Constitution "as a document of fixed meaning, supplied by those who framed and ratified it"); Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE app. C, at 6 (Office of Legal Pol'y, U.S. Dep't of Justice ed., 1987) ("In the interests of precision . . . I suppose I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.").

62 The last of these three, Fregean sense, is perhaps what is most naturally conveyed by "meaning," though Berger's statement that "the Founders clearly tied 'meaning' to 'reference,'" *supra* note 48, shows he would disagree. *See also* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 582

The distinction between intent and understanding has been associated with the distinction between the Framers and ratifiers.[63] However, because the drafters had understandings, and the ratifiers had intentions, the intention-understanding distinction cuts across the Framer-ratifier distinction. All four possibilities are live—Framers' intentions, Framers' understandings, ratifiers' intentions, and ratifiers' understandings.

The distinction between ratifiers and Framers is only critical if we take either an original purposes or original applications approach. It is possible that the Framers and ratifiers had significantly different purposes, or had different applications in mind. However, the Framers and the ratifiers *did* have the same text. Barring linguistic evolution from 1787 to 1788 (or, for the Fourteenth Amendment, from 1866 to 1867[64] or 1868), then, the historic, textually expressed sense should be the same between the two groups.

I find similarly obscure the connection between the intent-understanding distinction and the distinction between what was objective and public and what was subjective and private.[65] Intentions can be objective and publicly manifested (if, for instance, they are stated in the *Congressional Globe* or the *Federalist Papers*), while understandings can be subjective and private (if, for instance, they are stated only in a

(1998) (pointing out "a distinction between two uses of the term 'meaning'"); *id.* at 588–89 (relying briefly on Frege's sense-reference distinction to describe the different uses of "meaning").

63 *See, e.g.*, Balkin, *Redemption*, *supra* note 4, at 445 ("'[O]riginal intention' seemed to focus on the intentions of the persons who drafted the document, but surely it was the ratifiers' views that counted because only they had the authority to make the proposed Constitution law. 'Original understanding' better captured a focus on the authorizing audience for the text as opposed to the text's drafters."); Kesavan & Paulsen, *supra* note 8, at 1137 ("The shift to original understanding was part of an increased recognition that it was the action of the Constitution's *Ratifiers*—state ratifying conventions in the case of the original document and state legislatures in the case of the amendments—whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention and the Congresses proposing the amendments.").

64 That is, the time at which the Fourteenth Amendment was ratified by three-fourths of the northern denominator, if that was all that was required. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 7, at 364–80 (suggesting that only the votes of the northern states were necessary to ratify the Fourteenth Amendment).

65 *See, e.g.*, Kesavan & Paulsen, *supra* note 8, at 1138 ("The shift in emphasis from original intent to original understanding was also, in part, a shift away from the subjectivity and imprecision inherent in investigations of legislative history and toward a more objective test of constitutional meaning. Under 'original understanding,' nobody's subjective *intention* is controlling; only the Ratifiers' (reasonable Ratifier's?) (objective?) *understanding* of what the document meant or of what the Framers intended is controlling.").

diary, or are never stated at all). These distinctions, then, are also cross-cutting; we can have public intentions, public understandings, private intentions, and private understandings.

Fregean senses, however, are inherently sharable between more than one user of a language. Frege distinguished a term's "sense" from its subjective "conception," the idea or mental image a particular user associated with it: "The referent of a proper name is the object itself which we designate by its means; the conception, which we thereby have, is wholly subjective; in between lies the sense, which is no longer subjective like the conception, but is yet not the object itself."[66] Frege compares a term's referent to the moon, a term's sense to a single telescope used by more than one viewer to see the moon, and a term's conception to the individual retinal images produced by the light coming from the telescope.[67] The sense, like a telescope, "can be used by several observers."[68]

C. Three Nonhistorical Forms of Textualism

Turning away from approaches to interpretation that find the Constitution to be historically confined to the Founding, the most prominent theories tend to give at least some heed to the constitutional text. Many interpreters depart from either a historically situated or textually expressed Constitution, but relatively few attempt to do both.

There are at least three ways that various interpreters have proposed staying faithful to the text of the Constitution, but without adhering to its historic meaning. One is to view the text as expressing moral language, to be elucidated through the process of moral philosophy. A second is to view the text as if it were spoken today, expressing contemporary meaning. A third is to view the text as expressing common law concepts, to be updated through the process of adjudication.

In considering textualist definitions of the Constitution, we do well to remember that to be bound to the text of the Constitution is to be bound in some manner to the meaning expressed in that text. Article VI's command that judges are to be "bound" by "this Constitution" is not satisfied if judges put the physical text of the Constitution in a box and tie it to their foreheads or arms, à la Deuteronomy 6:8

66 Frege, *supra* note 44, at 213.

67 *Id.*

68 *Id.*

and the use of phylacteries.[69] To be bound to the constitutional language is obviously in some way to be bound to obey the content—the meaning—expressed by that language. However, the meaning of the text might not be the original meaning of the text, if we regard the text as the product of an intergenerational process, or as a new product today. In those cases, the meaning is the meaning of the author, but the author is either temporally extended or exists today.

The dispute between forms of textualism thus concerns the manner in which meaning is attached to the text. The Theory of Original Sinn views that process as historical and confined to the Founding: meaning is attached to the text when it is enacted, and is binding and unchanging. The versions of textualism discussed here see meaning as attached to the text either (1) through an extended process of philosophizing about the best conception for the textually expressed concept, (2) through the application of linguistic standards that exist at the time of interpretation, or (3) through an extended process of common law reasoning. Put another way, the dispute among forms of textualism concerns how to understand what sort of "constituting" the Constitution is. As textual theories, they agree that such constituting is textual. The difference concerns whether that constituting happens only at the Founding, or whether that constituting happens today, or through a temporally more extended philosophical or adjudicative process.

1. The Constitution as Set of Moral Principles

Ronald Dworkin has most prominently promoted the "moral reading" of the Constitution:

> The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.[70]

Dworkin explains, "According to the moral reading, these clauses [like the First and Fourteenth Amendments] must be understood in the way that their language most naturally suggests: they refer to

---

69 *See Deuteronomy* 6:6, 6:8 (English Standard Version) ("And these words that I command you today shall be on your heart. . . . You shall bind them as a sign on your hand, and they shall be as frontlets between your eyes."). Neither would the command to "support" the Constitution be satisfied by holding a copy of the text in one's hands.

70 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147 (1977).

abstract moral principles and incorporate these by reference, as limits on government's power."[71] "The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."[72]

Dworkin builds his theory of concepts and conceptions on W.B. Gallie's 1956 essay *Essentially Contested Concepts*, which introduced that distinction.[73] Gallie defined essentially contested concepts as those that "inevitably involve endless disputes about their proper uses on the part of their users."[74] He gave seven criteria for identifying them, two of which point to a temporally extended process for their delineation.[75] Gallie's "openness" criterion is that the embodiment of a concept "must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance."[76] Gallie's "progressive competition" criterion concerns "continuous competition . . . between the contestant users of the concept."[77]

Dworkin claims that his theory is textualist, but in no way originalist:

> If courts try to be faithful to the text of the Constitution, they will for that very reason be forced to decide between competing conceptions of political morality. . . . [T]he [philosophy of the] conservative critics of the Warren Court . . . ignores the direction to face issues of moral principle that the logic of the text demands.[78]

However, his belief that the language of the constitution expresses moral concepts is not rooted in a historical belief about how the Founders used constitutional language; he thus maintains his "long-standing opposition to any form of originalism."[79] Just as moral

---

71 RONALD DWORKIN, FREEDOM'S LAW 7 (1996).

72 *Id.* at 2.

73 *See* DWORKIN, *supra* note 70, at 103 (relying on W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956), for the distinction between concepts and conceptions).

74 Gallie, *supra* note 73, at 169.

75 *Id.* at 171–72, 180.

76 *Id.* at 172.

77 *Id.* at 180.

78 DWORKIN, *supra* note 70, at 136.

79 Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1258 n.18 (1997). Dworkin made this clarification to rebut the impression that the sketch of "semantic originalism" he had made in response to Scalia was Dworkin's own view. *See* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION 115, 119 (Amy Gutmann ed., 1997) (distinguishing "'semantic' originalism, which insists that the rights-granting clauses be read to say what those

philosophy is an intergenerational project, Dworkin says that each generation must decide for itself what conception of the constitutional concept is the right one. In a sense, he says, "[t]he broad clauses of the Constitution 'delegate' power to the Court to enforce its own conceptions of political morality," though he hastens to add that the Court must "justify its conception by arguments showing the connection between its conception and standard cases," adding, "[i]f the Court finds that the death penalty is cruel, it must do so on the basis of some principles or groups of principles that unite the death penalty with the thumbscrew and the rack."[80] "The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command."[81] The work of finding the proper conception of the constitutional concepts requires from succeeding generations "a fusion of constitutional law and moral theory" to produce tangible results, and such work is thus, like moral philosophy, never finished conclusively.[82]

Dworkin's theory has, of course, been quite influential, at least among theorists. Sotirios Barber and James Fleming offer one recent Dworkinian account that frames itself as a view about what the Constitution is. "The *what* question . . . [that is,] whether the Constitution is

---

who made them intended them to say, and 'expectation' originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have").

80 DWORKIN, *supra* note 70, at 136 n.1.

81 RONALD DWORKIN, LIFE'S DOMINION 145 (1993).

82 DWORKIN, *supra* note 70, at 149. Dworkin's "long-standing opposition to any form of originalism" is worth keeping in mind in distinguishing his view from the view that the language of some constitutional provisions may, in their historical context, express moral concepts and refer to moral reality. Dworkin's view of the text of the Constitution does not depend on a historical analysis of that language, but simply on how that language reads to him on its face. On the textualist semi-originalism of the Theory of Original Sinn, if there were reason to think that, in its historical context, the language of the Constitution expressed moral properties, then interpreters would be required to assess the moral facts in order to know the referent of constitutional language. However, I have argued that one of the most popular such examples—the requirement in the Equal Protection Clause that a state not "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1—actually refers to the equal provision of the remedial and enforcement functions of government, to which the phrase "protection of the laws" expressed in the Fourteenth Amendment's historical context, and not to a generic requirement of fairness or equal concern and respect, as Dworkin would have it. *Compare* Green, *Pre-Enactment History*, *supra* note 43, at 5–9 (arguing that the text of the Equal Protection Clause points to government functions), *with* DWORKIN, *supra* note 71, at 7–12 (arguing that the Equal Protection Clause is composed of moral concepts).

a code of detailed historical conceptions or a charter of abstract moral concepts is central to the question of *how* to interpret the Constitution."[83] "What justifies Dworkin's call for . . . a fusion [of constitutional law and moral philosophy] is the Constitution's own requirement that its interpreters think self-critically for themselves about the meaning of controversial constitutional provisions embodying general concepts."[84] Whether Dworkin, Barber, and Fleming are right depends, of course, on whether the text does in fact require such an intergenerational partnership.

2. The Constitution as Historically Unanchored, Contemporary Meaning–Expressing Text

Some theorists resist viewing the constitutional text as authored by the Founders, and instead consider the Constitution's present-day functions as critical in the process of assigning meaning to it.[85] The Constitution on such a view is not a constituting at the time of the Founding, but an act today of leaving those words in place, allowing them to constitute our frame of government. Accordingly, Alexander Meiklejohn views the Constitution as deriving its meaning from its acceptance today, not from its acceptance by the Founders:

> [The Constitution] derives whatever validity, whatever meaning, it has, not from its acceptance by our forefathers one hundred and sixty years ago, but from its acceptance by us, now. . . . What do We, the People of the United States, mean when we provide for the freedom of belief and of the expression of belief?[86]

Likewise, David Strauss, while his theory also has common law traditionalism as another component, embraces results that contradict the historical meaning of constitutional language, as long as those results fit with how that language might be used today. For example, Strauss believes that a criminal defendant's Sixth Amendment right "to have the Assistance of Counsel for his defense"[87]would not, at the time of the Founding, have expressed the right to a governmentally

83 SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION, at xvi (2007).

84 *Id.* at 30.

85 One commenter has complained that my earlier work fails to rebut the idea that the Constitution is a set of "self-given instructions to ourselves for the present." *See* Books Do Furnish a Room, http://booksdofurnisharoom.blogspot.com/2007/07/philosophy-of-language-and-originalism.html (July 19, 2007, 16:27 EST) (comment at 01:59 EST) (internal quotation marks omitted).

86 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 3–4 (1965).

87 U.S. CONST. amend. VI.

funded lawyer, but only the right to hire one's own lawyer.[88] However, Strauss thinks that the contrary result in *Gideon v. Wainwright*[89] can be justified because it fits with the text as it could be read today, even though this fit "is just a coincidence—almost a matter of homonymy."[90] Strauss reasons that such exploitation of homonymy is justified because the text is relevant not as a historically situated entity, but only as a coordination-enabling convention device today. "So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text . . . she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision."[91]

3. The Constitution as Collection of Common Law Concepts

Finally among forms of textualist Constitution unconfined to the Founding period is the common law Constitution. David Strauss and Felix Frankfurter's statements of such a constitutional ontology were quoted above.[92] The theorist who has probably explicated a common law Constitution most recently and in the greatest detail is Jed Rubenfeld.[93] He holds that the function of the constitutional text is to identify particular historic paradigm cases. Judges are then free to enunciate principles that will cover the paradigm cases and others as well:

> The Constitution's core applications serve as *paradigm cases*. They provide the reference points for the construction of doctrinal frameworks.
>
> Judges build interpretive frameworks or paradigms around the Constitution's paradigmatic Application Understandings. In this

88 *See* Strauss, *supra* note 20, at 919–20 (citing WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–33 (1955)). The Supreme Court has recognized this original, narrow view of the Sixth Amendment. *See* Bute v. Illinois, 333 U.S. 640, 660–66 (1948).

89 372 U.S. 335 (1963).

90 Strauss, *supra* note 20, at 920.

91 *Id.*

92 *See supra* notes 19–20 and accompanying text.

93 *See* JED RUBENFELD, FREEDOM AND TIME (2001); JED RUBENFELD, REVOLUTION BY JUDICIARY (2005) [hereinafter RUBENFELD, REVOLUTION]; Jed Rubenfeld, *Freedom and Time*, 1998 ACTA JURIDICA 291; Jed Rubenfeld, *Legitimacy and Interpretation*, in CONSTITUTIONALISM 194 (Larry Alexander ed., 1998) [hereinafter Rubenfeld, *Legitimacy*]; Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995) [hereinafter Rubenfeld, *Reading*]; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998).

> process they regard themselves as free to break from No-Application Understandings. . . .
>
> . . . .
>
> Reasoning from paradigm cases is a variegated business—incorporating considerations of text, policy, and justice; requiring ineluctably normative, even ideological judgment—but it is the primary business of constitutional interpretation. . . .
>
> In the course of paradigm case reasoning, judges periodically tear down the interpretive paradigms they have constructed, replacing them with new ones. . . .
>
> . . . .
>
> . . . [N]ew doctrine labors under the continuing obligation to do justice to the paradigm cases—or, more precisely, to do justice to the text in light of its paradigm cases.[94]

Rubenfeld sees the activity of judges elaborating doctrine over time as part of the essentially intergenerational aspect of self-government. It is only over the course of generations, not in the moment of a particular Founding, that a self-governing constitutional commitment can ever genuinely be made. Rubenfeld reads the Preamble as supporting his understanding: "If self-government is a generation-spanning project, there must be a generation-spanning subject of this project. This subject I call a people. . . . [T]he idea of an intergenerational 'people' is well known to American constitutional thought. The Constitution seems to claim such a people as its author."[95] I will consider below whether such an approach properly construes the Preamble.

D. The Constitution as Nonbinding

Paul Brest's famous article describes an approach to the Constitution that he calls "adjudication," suggesting that the Supreme Court abandon its "felt need to justify decisions by invoking the authority of the Constitution."[96] The text and original understanding, he says, are non-binding:

---

94 RUBENFELD, REVOLUTION, *supra* note 93, at 15–16, 17. The emphasis on paradigm cases is also a characteristic of Dworkin's approach. Recall his statement quoted earlier in the text accompanying note 80 that judges interpreting the Eighth Amendment must analogize punishments to the "thumbscrew and rack." Gallie's theory of concepts and conceptions also contends that essentially contested concepts are anchored by an "original exemplar whose authority is acknowledged by all the contestant users." Gallie, *supra* note 73, at 180.

95 Rubenfeld, *Reading*, *supra* note 93, at 1146 (citing U.S. CONST. pmbl.).

96 Brest, *supra* note 3, at 235.

> The only difference between moderate originalism and nonoriginalist adjudication is one of attitude toward the text and original understanding. For the moderate originalist, these sources are conclusive when they speak clearly. For the nonoriginalist, they are important but not determinative. Like an established line of precedent at common law, they create a strong presumption, but one which is defeasible in light of changing public values.[97]

Better, he says, to "treat the text and original understanding as persuasive but not authoritative."[98] Likewise, Walter Murphy is drawn to metaphors quite unlike those in Article VI's command that officials be "bound" by "this Constitution." He says, "The Framers were shrewd people and they understood many of the pitfalls of politics which endanger men of all ages; but their wisdom, to remain wisdom, can impose guidance, not chains."[99]

E. The Contingency of Constitutional Ontology

Summarizing the material above, we can organize our seven possible constitutional ontologies according to whether they are textualist, historically bound, or both:

	Confined to Founding	*Non-Fixed*
Non-Textualist	Original Ultimate Purposes Original Applications	Non-Binding Construction
Textualist	Originally Textually-Expressed Sense	Moral Principles Common-Law Concepts Contemporary Meaning

To decide which of these seven ontologies is the correct one, we should first clarify whether we are seeking to answer a general question about the nature of any constitution, or whether we are seeking merely to assess the nature of *our* Constitution. If the former question had a single answer, then we could know the nature of our constitution merely from general considerations, and no one would need to consider particular details about the construction of our own particular Constitution. However, particular details plainly are relevant to constitutional ontology. Because the Constitution could have embedded any of these seven ontologies explicitly, general reasoning cannot be conclusive on the nature of any particular constitution.

---

97 *Id.* at 229.

98 *Id.* at 235.

99 Walter F. Murphy, *The Constitution: Interpretation and Intent*, 45 A.B.A. J. 592, 595 (1959).

Consider, then, seven ways that the Constitution could have embedded any of our seven constitutional ontologies explicitly:

> 1. The ultimate purposes of the drafters and ratifiers of this Constitution shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support them, any thing in the expected applications or text of this Constitution notwithstanding.
>
> 2. The applications of this Constitution expected by the drafters and ratifiers of this Constitution shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support them, resolving specific controversies in the way in which those drafters and ratifiers would have resolved them.
>
> 3. The meaning expressed by the text of this Constitution at the time of the adoption of this Constitution shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support that meaning, notwithstanding any contrary expectations of the drafters or ratifiers, to the extent that those contrary expectations depend on their incorrect factual assessments.
>
> 4. The moral principles expressed in the text of this Constitution, as elaborated by the methods of moral philosophy by the founding and successive generations, shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support them, interpreting those principles in light of their history to make the Constitution the best it can be.
>
> 5. The meaning of the text of this Constitution, as expressed by the text at the time officers fulfill their offices, shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support it.
>
> 6. The concepts in the text of this Constitution, as elaborated by the methods of the common law by the founding and successive generations, shall be the supreme law of the land, and all legislative, executive and judicial officers shall be bound by oath or affirmation to support them.
>
> 7. This Constitution shall not be binding on legislative, executive and judicial officers, but such officers shall retain the right to depart from its requirements in light of sufficiently important countervailing considerations.

Imagine further that officials actually swore oaths in keeping with these variants on Article VI. If that were the case—that is, if officials' oaths explicitly adopted a theory of the nature of the Constitution—then it would be obvious what theory of the nature of the Constitution

was the right one. We would not have discretion to decide for ourselves what sort of Constitution or interpretive method might seem best to us.[100]

Our constitutional ontology, then, is contingent—it depends on the particular way in which Article VI is written. There is nothing necessary about a written constitution that literally requires constitution makers to write their supremacy clause in one of these ways or another. We might, of course, have reasons to believe that some of these possible supremacy clauses would be very foolish clauses to write. Added to the empirical proposition that the Founders were not fools, we might then have reason to think that the Founders did not, in fact, adopt such a supremacy clause. However, there is nothing *necessary* about adopting a non-foolish supremacy clause.

Because the nature of our Constitution is contingent and would plainly be determined by Article VI if it were explicit, we must devote attention to our actual Article VI to see if it contains an implicit constitutional ontology. To decide the nature of the actual Constitution, there is no substitute for figuring out what "this Constitution" means in the actual Article VI, and deciding which of these seven possibilities—or some other possibility—best captures that meaning.[101]

I hope to explain in more detail in a later work why a constitutional theory rooted in "this Constitution" is superior to other possible foundations. Others seek to understand the nature of the Constitution by seeing it as desirable[102] or legitimate,[103] or by reducing inter-

100 This conclusion will, of course, itself not seem obvious to many. Below in Part III.B, I consider the most frequent objection to the constitutionally specified constitutional ontology: that such a self-definition would be viciously circular.

101 Of course, we might decide after looking at the evidence that we really can't tell what "this Constitution" means in Article VI. In that case, however, we would simply not know the nature of the Constitution; such ignorance would not give us license to decide on our own what sort of Constitution we would like best.

102 *See, e.g.*, Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 548 (1999) ("[O]riginalists, like all other participants in constitutional theoretical debates, carry a burden of normative justification. They must attempt to establish that the constitutional regime would be a better one—as measured by relevant criteria—if constitutional practice were exclusively text-based and if originalist precepts were consistently followed."); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 384 (2007) ("Provisions created through the strict procedures of constitutional lawmaking are likely to have good consequences. Sustaining these good consequences, however, depends on adhering to the Constitution's meaning when it was ratified.").

103 *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 107 (2004) ("Overriding writtenness to reach results that some deem superior places the rights of everyone at peril. Originalism as a method of interpretation is crucial to the structural protection provided by writtenness."); *id.* at 109 ("[C]onsiderations of legitimacy

pretation to a search for the author's intent,[104] or by understanding the general nature of law.[105] But the contingency of constitutional ontology helps show why such approaches fall short. Whether our Constitution is desirable or legitimate is itself contingent; our best assessment of which ontology represents the actual Constitution and which one is most normatively attractive can come apart.[106] Likewise,

---

justify originalism as well [as practical considerations]. Constitutional legitimacy requires assurance that only proper laws are enacted, applied, and enforced. A written constitution is a crucial structural feature that helps provide such assurance. This assurance would not be forthcoming, however, if the political actors who must respect these limits, including judges, are free to disregard them. In short, it contributes to constitutional legitimacy for the original meaning of written limits on the power of lawmakers to remain the same until they are properly amended."); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 359 (2007) ("Originalists either bracket the problem of the document's legitimacy, evade the basic question of the document's legitimacy, or are content that they have come up with some account that takes this question off the table. Living constitutionalists just can't get over it; the anxiety about legitimacy is always present and pervasive. . . . Living constitutionalists are plagued by anxiety about the dead hand of the past—and think we need to update and affirm the document's underlying principles if it is to be binding on anyone living today." (footnote omitted)).

104 *See, e.g.*, Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 723 (1982).

105 *See, e.g.*, BORK, *supra* note 61, at 145 ("'If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning that the lawmakers were understood to have intended. . . . There is no other sense in which the Constitution can be what article VI proclaims it to be: 'Law'.'").

106 Cass Sunstein's recent attack on originalism recognizes the contingency of constitutional theory, but without taking it far enough. *See generally* CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS (2009) (identifying and analyzing the argument that if many people think similarly, their judgment is entitled to respect and consideration). He imagines four possible places or situations—Thayerville, Scalialand, Smallville, and Olympus—in which different approaches to constitutional interpretation (deference to majorities, originalism, incremental minimalism, and moral readings of the Constitution, respectively) would produce the best results. *Id.* at 20–22. We should reject originalism and deference to majorities, he says, because the way our world actually is, these methods of interpretation would produce bad results: "We may be in Smallville; we may be in Olympus. But we are certainly not in Scalialand or Thayerville." *Id.* at 32. Sunstein properly recognizes that whether a method of interpretation is proper is a contingent issue, depending on the details of what the actual world is like. However, he fails to consider that whether or not our actual Constitution produces good results is itself contingent.

To be fair, Sunstein assumes that the proper approach to constitutional interpretation would necessarily produce good results only after he considers and briefly rejects the idea that the Constitution defines its own nature: "If the founding document set out the rules for its own interpretation, judges would be bound by these rules (though any such rules would themselves need to be construed). But the Constitution sets out no such rules." *Id.* at 23; *see also id.* at x (arguing that "[n]othing in

the constitutional author whose intention some think is interpretively binding might make it clear that it speaks only through a text, or intergenerationally. The Constitution might explicitly make something "supreme law" that would not fall under legal philosophers' favored account of the concept.[107]

II. CONSTITUTIONAL INDEXICALS AS A BASIS FOR TEXTUALIST SEMI-ORIGINALISM

Let us turn to the details of assessing the meaning of "this Constitution" in Article VI. Let me repeat the relevant text:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .[108]

What does "this Constitution" mean in Article VI?

---

the Constitution itself rules out any of the three approaches that I shall be exploring," but rather "[t]he Constitution does not set out the instructions for its own interpretation"). Of course, the point of this entire Article is that Sunstein is wrong about *that*. It is also noteworthy that in assuming that the Constitution *could* prescribe rules for its own interpretation, Sunstein implicitly rejects the argument made by many others that such an assertion would be viciously circular. *See infra* Part III.B. Were Sunstein to accept the argument I make here, he would presumably also accept that Article VI's constitutional self-presentation would be binding even if it yielded bad results.

107 Mitchell Berman distinguishes "hard" from "soft" originalism based on whether the basis for an interpretive approach is thought to follow necessarily from the nature of interpretation or the nature of regarding a constitution as authoritative (hard originalism) or whether it is based on the contingent costs and benefits of such an approach (soft originalism). *See* Berman, *supra* note 4 (manuscript at 3) ("[O]riginalism is 'hard' when justified with reference to reasons that purport to render it (in some sense) ineluctably true; it is soft when predicated on contingent and contestable weighings of the costs and benefits of originalism relative to other interpretive approaches."). Soft originalism includes "arguments . . . sounding in democracy, the rule of law, the cabining of judicial discretion, and the like." *Id.* (manuscript at 4). My argument based on Article VI falls into neither of these categories. Because Article VI could have been written in a way that adopts any of the seven constitutional ontologies, the ontology that I believe it does adopt is in no sense necessarily true. However, neither is the constitutional self-presentation in Article VI simply one consideration among many, to be outweighed by competing normative considerations. Even if another method of interpretation is more attractive or would produce better results, interpreters who take the Article VI oath are not at liberty to disagree with Article VI's constitutional self-presentation.

108 U.S. CONST. art. VI, cl. 2–3.

A. The "This Union" Problem

While I will ultimately agree with Amar, Kesavan and Paulsen, and Solum about the textualist and originalist lessons of the "this Constitution" provisions,[109] the short form of their argument fails. The phrase "this Constitution" on its own is not inherently a textual or historical self-reference, because the word "this" does not always refer to a text or to the historical circumstance in which the text is spoken. I can point to a Constitution and say "this Constitution is written in black ink," but my words are not *self*-referential—they do not refer to the text of my sentence. When Justice Iredell said in *Ware v. Hylton*[110] in 1796 that "[u]nder *this Constitution* therefore, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour of its own authority to be executed in fact,"[111] he was plainly not claiming that his *Ware* opinion was itself the Constitution, or that the Constitution was historically confined to 1796. The demonstrative "this," in that particular context, plainly points outside the text and to a different time.

Indeed, we need look no further than the Constitution itself to find alternate uses of the demonstrative "this." Article IV section 3 provides, "[n]ew States may be admitted by the Congress into *this Union*,"[112] and Article I section 2 refers to "the several States which may be included within *this Union*."[113] Despite the demonstrative "this," "this Union" is not composed of text, nor is it historically fixed. A common law constitution might be seen as an institution roughly akin to the Union: just as new states can be added to the Union without making it a new entity, new cases can be added to the Constitution without any fundamental alteration. If the Union can be temporally extended and nontextual despite the use of "this" to refer to it, perhaps the Constitution can too.

The bare use of "this Constitution" in Article VI, then, leaves our constitutional ontology unspecified. However, a bit more digging can pin the phrase down in both a textualist and historical way. In addition to considering constitutional indexicals in the federal Constitution, I will canvass state constitutions using the same phrase. Absent evidence that state constitutions would use "this Constitution" differ-

109 *See supra* notes 7–9.

110 3 U.S. (3 Dall.) 199 (1796).

111 *Id.* at 277 (first emphasis added).

112 U.S. CONST. art. IV, § 3, cl. 1 (emphasis added).

113 *Id.* art. I, § 2, cl. 3 (emphasis added); *see also id.* art. IV, § 4 ("The United States shall guarantee to every State in *this Union* a Republican Form of Government . . . ." (emphasis added)).

ently from how that phrase is used in the Federal Constitution—and I have encountered no such evidence—it seems reasonable to assume the phrase refers to an entity of the same basic nature. Obviously, "this Constitution" in the Illinois Constitution refers to the Illinois Constitution, and not the Federal Constitution, but if there is good reason to think that the demonstrative "this Constitution" is used in the Illinois Constitution to refer to a historically situated text, there is likewise good reason to think that "this Constitution" in the Federal Constitution does likewise, albeit a different text uttered in a different historic situation.

First I will present reasons why "this Constitution" is indeed binding in the way Article VI says, then reasons why "this Constitution" is a constituting taking place at the constitutional text, and finally reasons why "this Constitution" refers to the time of the Founding.

B. "Shall Be Bound" and the Binding Constitution

Article VI says, of course, that "this Constitution" is binding law; officials "shall be bound" to support it. The current form of the oath required of federal officers reads:

> I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.[114]

Taken at face value, the Constitution is plainly binding on office-holders who take the oath. The leading advocate of abandoning our practice of always "invoking the authority of the Constitution,"[115] Paul Brest, briefly dismisses an argument for a binding Constitution from the contemporary practice of taking the oath. He says, "It might be thought that judges and other officials have expressly consented to be bound by the Constitution by virtue of their oath of office 'to support this Constitution.' But the oath must be understood in the context of two centuries of constitutional decisionmaking."[116]

---

114 5 U.S.C. § 3331 (2006). This language was adopted in 1868. *See* Act of July 11, 1868, ch. 139, 15 Stat. 85 (current version at 5 U.S.C. § 3331). Before then, the oath was simply "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23, 23.

115 *See supra* note 96 and accompanying text.

116 Brest, *supra* note 3, at 225 n.80 (quoting U.S. CONST. art. VI, cl. 3). Ethan Leib likewise says that the oath leaves room for "taking the Constitution on terms other

Brest seems to be suggesting that when contemporary officeholders take their oaths, they are not really taking the Constitution on its *own* terms—that is, on the terms specified in Article VI making "this Constitution" supreme. Contemporary officeholders might instead be swearing to uphold a common law constitution when they refer to "the Constitution," notwithstanding the possibility that Article VI adopts a contrary definition of "this Constitution." However, Brest's view is incompatible with how officeholders explain their own oaths. Those explanations repeatedly and emphatically equate current oaths with the requirement in Article VI. Senator Durbin, for instance, has said:

> There are so many things that divide us on the floor of the Senate, between Republicans and Democrats, but there is one thing we are united behind, and that is our oath of office. That oath of office is explicit. This, in part, is what it says. Each of us takes this oath. To the best of our ability we will:
>
> . . . preserve, protect and defend the Constitution of the United States.
>
> Isn't it interesting that when this Constitution was written, our Founding Fathers wanted to make certain that whoever served as President, Vice President, Member of the House or Senate, would not swear their loyalty to the United States of America but would swear their loyalty to this document. You could not become a Member of this body unless you were prepared, under oath, to say you would preserve, protect, and defend the Constitution of the United States.
>
> . . . [T]he oath of office which each of us takes is a reminder of our solemn responsibility when it comes to this Constitution.[117]

Similarly, Senator Byrd has said:

> Each of us took an oath under this Constitution. You took it in the chair, Mr. President. Mr. Senator from Virginia, you took it. This is the Constitution that James Madison from the State of Virginia helped to write; that George Washington helped to write. We take an oath to support and defend that Constitution.[118]

---

than its own," because "[w]e have to know what the oath means." Posting of Ethan Leib to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/01/if_all_it_takes.html (Jan. 30, 2006, 18:28 EST) (comments by Chris at 17:09:17 EST and Ethan Leib at 18:28:04 EST).

117 150 CONG. REC. S7969 (daily ed. July 13, 2004) (statement of Sen. Durbin) (first alteration in original).

118 148 CONG. REC. 20382 (2002) (statement of Sen. Byrd).

Senator Kerry has said, "I took almost the same oath when I came here to the Senate. The obligation is the same: to defend what the Framers of the Constitution intended and never to give in to the passions of the moment . . . ."[119] Other examples of congressional representatives equating their oaths with the requirement of Article VI and the historic Constitution are legion.[120]

---

119 152 CONG. REC. S6522 (daily ed. June 27, 2006) (statement of Sen. Kerry).

120 Examples can be provided from every decade of our history. *See, e.g.*, 151 CONG. REC. H3105 (daily ed. May 10, 2005) (statement of Rep. Poe) ("Mr. Speaker, . . . [the] justices of the United States Supreme Court take [the judicial oath] to uphold America's Constitution, the sacred manuscript our Nation was established upon, the foundation of who we are."); 139 CONG. REC. 2391 (1993) (speech by Sen. Simon introduced as exhibit) ("As senators we take only one oath, to 'support and defend the Constitution.' The Constitution says that we in Congress 'shall be bound by oath or affirmation, to support this Constitution.' Cynics say that we will just ignore the Constitution. While I differ with many of my colleagues on a host of issues, I do not believe that anyone here will say, 'Let's just ignore the Constitution.'"); 132 CONG. REC. 15401 (1986) (letter of Senators Kennedy, Leahy, Biden, Metzenbaum, and Simon) ("The Constitution is a self-executing document and its viability as the 'supreme law of the land' depends on the fidelity and faithfulness of those who are entrusted with governmental power. . . . To ensure that such persons remain faithful to their trust, Article VI of the Constitution specifies that [an oath or affirmation will be given to support the Constitution]."); 116 CONG. REC. 12268 (1970) (statement of Rep. Flowers) ("[T]he Constitution of the United States provides that a Supreme Court Justice . . . shall be bound 'by oath or affirmation to support this Constitution'. . . . As a Representative in Congress and sworn to do my duty under this same Constitution . . . this requires me to join in the resolution . . . ."); 110 CONG. REC. 2472 (1964) (statement of Rep. Matthews) ("[A]rticle VI, clause 3, requires that Senators and Representatives, among others, [shall be bound by an oath to support the Constitution]. . . . In conformity with the constitutional mandate, each and every Member of this House has repeated those most familiar words [then quoting the oath language]."); 96 CONG. REC. 6553 (1950) (statement of Rep. Plumley) ("The oath of office taken by the Members of the House is administered by the Speaker, and by the Vice President to the Senators. . . . The Constitution provides that the President of the United States, Senators, Representatives, members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support the Constitution."); 86 CONG. REC. app. 1493 (1940) (statement of Rep. Thorkelson) ("[The first two paragraphs of Article VI] should be quite convincing as to the document upon which the laws of the United States shall be made and upon which the judges of every State shall be bound. It should also be informative to other officials, as stated in this quotation."); 72 CONG. REC. 8445 (1930) (statement of Sen. Shortridge) ("[W]e are guided, we are bound, under our oaths . . . ."); 62 CONG. REC. 1791 (1922) (statement of Rep. Bankhead) ("The primary, and what should be the absolutely conclusive, test before we should proceed any further is, Is the bill within the warrant of the constitutional powers granted to Congress by the people and the States? . . . [T]here is higher authority than the spoken words of any man, living or dead, upon the necessity of that inexorable inquiry. I refer to section 3 of Article VI of the Constitution itself . . . ."); 48 CONG.

REC. 1913 (1912) (statement of Rep. Dies) ("[H]aving sworn to support the Constitution, I felt it my duty to vote against the proposition. . . . [After quoting Article II on the treaty power:] This, Mr. Speaker, is the fundamental law of the land. The Constitution further requires that [then quoting Article VI]."); 33 CONG. REC. 1126 (1900) (statement of Rep. Snodgrass) ("[Article VI] . . . makes it mandatory, not discretionary, that [members of Congress] be bound by oath."); 22 CONG. REC. 326 (1890) (statement of Rep. Wilson) ("The intent [of a meeting of senators from states on the brink of secession] was to induce all of said State officers to join in and promote the conspiracy which that meeting represented, notwithstanding the Constitution of the United States declared [in Article VI that they were bound to support the Constitution]. . . . The State officers appealed to by it surrendered their consciences and violated their oaths of office. They joined the conspiracy whose purpose it was to destroy the Government whose Constitution they were sworn to support . . . ."); 18 CONG. REC. 1157 (1887) (statement of Rep. Hammond) ("Under that requirement [of Article VI] the Representatives in the First Congress took said oath, pursuant to a resolution of the House, administered by the chancellor of New York."); 9 CONG. REC. 750–51 (1879) (statement of Rep. Robeson) ("*Suprema lex!* What is supreme law? It is a law which has the power to execute itself upon citizens and property. . . . We, when we stand up before the Speaker's desk and raise our hands to Heaven and bind our governmental duty by the solemnity of an oath fast to the throne of the eternal God, swear to do what? Not to sustain the constitution and laws of any State, but the Constitution and laws of the United States."); CONG. GLOBE, 40th Cong., 2nd Sess. 2142 (1868) (statement of Rep. Plants) ("There can be no State government, in the American sense of that term, without . . . legislative, judicial, and executive officers duly elected and qualified to exercise these several functions. And, sir, one of the absolutely essential qualifications is the being 'bound' by oath or affirmation to support the Constitution. It is not enough that he simply take the oath. He must be bound by voluntary assent. In article six of the Constitution will be found [the] emphatic words. . . . This is the supreme law of every State. Without this 'binding' there can be no such thing as a Legislature."); CONG. GLOBE, 34th Cong., 1st Sess. 74 (1855) (statement of Rep. Stewart) ("Was it ever conceived by the framers of the Constitution, or by the national Legislative Council of 1789, that such a state of things as this [lack of a speaker to administer the oaths] should exist? The Constitution of the United States . . . declares that the State and National officers, before they shall undertake the exercise of any trust, or the discharge of any responsibility, shall take an oath to support the Constitution. . . . I apprehend there is a great duty which we owe to the country. There is a high duty which we have to discharge."); CONG. GLOBE, 27th Cong., 1st Sess. app. 315 (1841) (statement of Rep. Hastings) ("My constituents did not send me here to be guided by precedent, no matter how imposing or high in his country's estimation the example; they sent me here to do their will under the Constitution—that instrument to be my text-book, irrespective of precedent. Preparatory to entering on my duties, I pledged myself, under the solemnity of an oath, to support the Constitution, and it is unnecessary to declare that I will adhere to it to the best of my judgment. . . . The Constitution will be my reference. . . . I will confine myself . . . to the instrument that was planned by sages and patriots, at a moment that they had the freedom and happiness of mankind deeply at heart; those great men, just emerged from the perils of the Revolution . . . ."); 14 REG. DEB. 1602 (1837) (statement of Rep. Moore) ("What is required of us before entering upon our duties as representatives? It is required, by [Article VI of the constitution]. Sir, the requisition

Brest supplements this argument with a reference to Judge Gibson's anti-*Marbury*[121] view of the oath in 1825's *Eakin v. Raub*.[122] However, Gibson's comments concern the *occasions* for constitutional interpretation, not its proper method. Even if *Marbury* is somehow wrong, and Gibson is right that courts should enforce statutes they think might be unconstitutional, Article VI would still require officeholders to obey "this Constitution." Indeed, Gibson himself is emphatic that the Constitution is binding and unchanging:

> The constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error*, which affords a ready justification for every usurpation that has not been resisted *in limine*."[123]

---

is emphatic and positive—couched in language not to be misunderstood. Our duty is palpable; we cannot err ignorantly."); 41 ANNALS OF CONG. 173 (1824) (statement of Sen. Benton) ("Upon this [Article VI] oath, each person intrusted with the great duty of expounding the Constitution, is bound to go back to the words of the instrument itself, whenever a question of construction arises. He may and ought to consult the opinions of others, in order to enlighten his own. He may quote the opinions of others to give greater weight to his own; but he cannot surrender his own in favor of another, which he believes to be wrong, without disregarding the obligation by which he has bound himself to support the Constitution."); 32 ANNALS OF CONG. 1445 (1818) (statement of Rep. Anderson) (quoting phrasing of Article VI regarding whether status as representative begins before or after taking the oath); 13 ANNALS OF CONG. 730 (1803) (statement of Rep. Taggart) ("[S]o far as it respects myself the consideration of taking a solemn oath to support the Constitution of the United States is of considerable weight. I cannot see how I could act consistently in taking such an oath to day, and endeavoring to introduce an alteration in one of its important principles and provisions to-morrow."); 1 ANNALS OF CONG. 269 (1789) (statement of Rep. Lawrence) (Joseph Gales ed., 1834) ("[T]he persons who are to take this oath in conformity to the Constitution, will conceive themselves, after having taken such oath, under an obligation to support the Constitution. . . . If the Constitution is the supreme law of the land, every part of it must partake of this supremacy; consequently, every general declaration it contains is the supreme law.").

121 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (utilizing the oath of office, including the requirement that judges act according to the Constitution, as support for the principle of judicial review).

122 12 Serg. & Rawle 330, 352–53 (Pa. 1825) (Gibson, J., dissenting) ("The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty; otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who in the execution of his office has nothing to do with the constitution."); *see* Brest, *supra* note 3, at 225 n.80.

123 *Eakin*, 12 Serg. & Rawle at 345.

Gibson's point is that, constitutionally, judges may only exercise judicial power, and he thought that power did not extend to passing judgment on the constitutionality of statutes. Given that view, it was precisely the fact that Gibson thought he was bound to obey the Constitution itself, rather than later judicial glosses, that made him resist judicial review despite almost everyone else's disagreement. For Brest to suggest on the basis of Judge Gibson's opinion that the oath is itself "altered by judicial decision"[124] is ironic.

Article VI is, then, both a part of the Constitution and an extremely prominent part of our contemporary political and legal culture. To contend that contemporary oaths refer to something other than Article VI's "this Constitution" is simply to mischaracterize our present culture. Of course, there are surely other elements of our current legal culture inconsistent with the Constitution, properly interpreted. To the extent that officeholders support such constitutional violations and yet continue to believe that we obey Article VI, they are being inconsistent. They can either eliminate the inconsistency by eliminating the unconstitutional practices or by abandoning the Article VI oath. But to pretend, as Brest seems to, that the current Article VI oath does not really refer to the same thing that Article VI does, is inconsistent with the predominant attitude of officeholders themselves.

C. Textualism

Moving to the substance of the constitutional indexicals, I will attempt to show first how textualism, and then a historically confined Constitution, are embodied in Article VI. The burden of the textualist component of my inquiry is to show that the constitutional text, not the original purposes or the original expected applications, is the actual "this Constitution." As explained above, it might be possible to see the common law constitution, the contemporary meaning constitution, or the moral principle constitution as forms of textualism, albeit forms of textualism in which the text is authored by an intergenerational common law process, by citizens today, or by a succession of moral philosophers. The next section, arguing for a historically confined Constitution, will attempt to eliminate these possibilities. This subsection, however, argues that the text, rather than expected applications or ultimate purposes, is "this Constitution."

---

124 *See* Brest, *supra* note 3, at 225 n.80 ("But the oath must be understood in the context of two centuries of constitutional decisionmaking.").

1. Here Is the Constitution: "This" and Forms of "Here"

Many clauses in the federal and state constitutions use indexicals of location, referring to what takes place "herein," or what it specified in "foregoing" sections. The Philadelphia Convention's cover letter to the Constitution, which accompanied the delivery of the text of the Constitution to Congress meeting in New York, refers to the "the preceeding Constitution," equating it to the object of ratification and to "this Constitution":

> *Resolved*, That *the preceeding Constitution* be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that *it* should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying *the Same*, should give Notice thereof to the United States in Congress assembled.
>
> *Resolved*, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified *this Constitution*, the United States in Congress assembled should fix a Day on which the Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, *proceed to execute this Constitution*.[125]

Note that the cover letter equates "the preceeding Constitution" with "it" and "the Same" and "this Constitution." Neither purposes nor expected applications precede this resolution, only the text.

Some state constitutions, and official documents following the constitutions, say "here is the Constitution" even more explicitly. The

125 *See* 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 501 (Roscoe R. Hill ed., 1936) (second, third, fourth, sixth, and seventh emphases added); *see also* 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 665–66 (Max Farrand ed., rev. ed. 1937) (text following the Constitution spelling "preceeding" as "preceding").

attestation clause following the official copy of the New Jersey Constitution of 1844 says, "I, George Wurts, Secretary of State of the State of New Jersey, do hereby certify *the foregoing* to be a true *copy of the Constitution* of the State of New Jersey as amended, as the same is taken from and compared with the original Constitution and amendments thereto, now remaining on file in my office."[126] The Constitution is the foregoing text. The Constitution of Alabama's separation of powers provision refers to "the instances *in this Constitution hereinafter* expressly directed or permitted,"[127] both presupposing that "herein" is the location of "this Constitution" and that the Constitution performs its tasks "expressly," i.e., textually.[128]

Several state constitutions likewise refer to "the *following* constitution."[129] What follows is not a purpose or an expected application, but a text. The Alaska Constitution refers to ordinances "appended to this constitution."[130] Obviously, these ordinances are not appended to the ultimate purposes or expected applications of the constitution; they are appended to the text. The Illinois and Montana constitutions refer to particular "following" provisions being "part of this Constitu-

126 N.J. CONST. of 1844 (attestation clause of Secretary of State George Wurts) (emphasis added).

127 ALA. CONST. art. III, § 43 (emphasis added).

128 For more argument based on "expressly," see *infra* Part II.C.5.

129 ALA. CONST. of 1861, pmbl. ("We the People of the State of Alabama . . . do ordain and establish the following Constitution . . . ."); ALA. CONST. of 1819, pmbl. ("We, the people of the Alabama Territory . . . do ordain and establish the following constitution . . . ."); ARK. CONST. of 1836, pmbl. ("We, the people of the Territory of Arkansas . . . do ordain and establish the following constitution . . . ."); CONN. CONST. of 1818, pmbl. ("The people of Connecticut . . . hereby . . . ordain and establish the following Constitution . . . ."); FLA. CONST. of 1865, pmbl. ("We, the people of the State of Florida . . . do mutually agree, each with the other, to form the following constitution . . . ."); ILL. CONST. of 1818, pmbl. ("The people of the Illinois Territory . . . do, by their representatives in convention, ordain and establish the following constitution . . . ."); IND. CONST. of 1816, pmbl. ("We the Representatives of the people of the Territory of Indiana . . . do ordain and establish the following constitution . . . ."); LA. CONST. of 1812, pmbl. ("We, the Representatives of the People of all that part of the Territory or country ceded under the name of Louisiana . . . do ordain and establish the following constitution . . . ."); ME. CONST. pmbl. ("We, the people of Maine . . . do ordain and establish the following constitution . . . ."); MICH. CONST. of 1835, pmbl. ("We, the people of the Territory of Michigan . . . do ordain and establish the following constitution . . . ."); MISS. CONST. of 1817, pmbl. ("We, the representatives of the people inhabiting the western part of the Mississippi territory . . . do ordain and establish the following constitution . . . ."); OHIO CONST. of 1802, pmbl. ("We, the people of the eastern division of the territory of United States northwest of the river Ohio . . . do ordain and establish the following constitution . . . .").

130 ALASKA CONST. art. XV, § 24.

tion."[131] Again, the text, arranged spatially on the page, is what "follows." The Alabama Constitution refers to the "*preceding* section or elsewhere *in this Constitution*."[132] The Kentucky Constitution says, "We, the representatives of the people of Kentucky . . . do ordain and proclaim *the foregoing* to be the Constitution of the Commonwealth of Kentucky from and after this date."[133]

Further, an examination of "here" and other spatial indexicals in the Federal Constitution makes clear both that "here" refers to the text, and that the jobs performed "herein" are the same jobs performed by "this Constitution." In effect, by saying both that the constitutional text is "here," and "here" is the Constitution, the Constitution is saying that the constitutional text is "this Constitution."

The drafters of the Constitution could have used "here" to refer to Philadelphia, of course, or more narrowly to Independence Hall. They could have used it to refer to the entire territory of the United States. But it is clear that they used it to refer to the constitutional text. Article I, Section 9, Clause 4 refers to the "the Census or Enumeration *herein before* directed to be taken,"[134] referring to Article I, Section 2, Clause 3, which appears "herein before"[135] *textually*. Article I, Section 8, Clause 18 refers to "the *foregoing* Powers," which are foregoing *textually*.[136] The conclusion to the Constitution says, "In Witness whereof We have *hereunto* subscribed our Names," followed by the thirty-nine signatures.[137] The location of "hereunto" is the location of the signatures—that is, in the text. Several state constitutions likewise use the term "expressly" in relation to a form of "here" that makes clear "here" refers to the text.[138] If things done "here" are

131 ILL. CONST. transition sched. ("The following Schedule Provisions shall remain part of this Constitution until their terms have been executed."); MONT. CONST. transition sched. ("The following provisions shall remain part of this Constitution until their terms have been executed.").

132 ALA. CONST. art. VII, § 174 (emphasis added).

133 KY. CONST. ordinance (emphasis added).

134 U.S. CONST. art I, § 9, cl. 4.

135 *Id.* art. I, § 2, cl. 3.

136 *Id* art I, § 8, cl. 18 (emphasis added). "Foregoing" is related to "here" because it is an indexical of location—understanding it requires understanding where the speaker is situating himself—that is, what the speaker would mean by "here."

137 *Id.* art VII (emphasis added).

138 *See, e.g.*, ALA. CONST. amend. 546 (referring to taxation amount "expressly provided herein"); ALA. CONST. of 1819, art. II, § 2 (referring in separation of powers provision to "instances hereinafter expressly directed or permitted"); ARK. CONST. art. II, § 23 (power of taxation and eminent domain "is herein fully and expressly conceded"); ARK. CONST. of 1836, art. II, § 24 (referring in separation of powers provision to "instances hereinafter expressly directed or permitted."); FLA. CONST. art. II, § 3 (referring to cases "expressly provided herein"); FLA. CONST. of 1885, art. VIII,

done "expressly," then "here" is obviously the location of the text.[139]

"Here" and "this Constitution" are linked in the Federal Constitution because they are both the location of the constitutional vestings of power. Article I, Section 1 provides: "All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . ."[140] But Article I, Section 8, Clause 18 grants Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the *foregoing* Powers, and all *other Powers vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof."[141] Two aspects of the Sweeping Clause tie "here" to "this Constitution." First, the reference to "other" powers implies that the "foregoing" powers are part of the "powers vested by this Constitution." Second, the "vesting" of powers is accomplished both "herein"

§ 11(5) (1956) (referring to what is "expressly authorized herein"); ILL. CONST. of 1818, art. I, § 2 (referring to what is "hereinafter expressly directed or permitted"); IND. CONST. of 1816, art. II (referring to "instances herein expressly permitted"); IOWA CONST. of 1846, art. III, § 1 (referring to "cases hereinafter expressly directed or permitted"); IOWA CONST. of 1846, art. IV, § 12 (referring to cases "hereinafter expressly provided"); KY. CONST. § 153 (referring to what is "herein expressly provided"); KY. CONST. of 1792, art. I, § 2 (referring to "instances hereinafter expressly permitted"); LA. CONST. of 1812, art. I, § 2 (referring to "instances hereinafter expressly directed or permitted"); ME. CONST. art. III, § 2 (referring to "cases herein expressly directed or permitted"); MD. CONST. art. XV, § 9 (referring to "cases otherwise expressly provided herein"); *id.* art. IV, pt. V, § 41-A(3) (other provisions are "hereby expressly made applicable"); MISS. CONST. of 1817, art. II, § 2 (referring to "instances hereinafter expressly directed or permitted"); NEV. CONST. art. III, § 1 (amended 1996) (referring to "cases herein expressly directed or permitted"); *id.* art. V, § 12 (referring to what is "herein expressly provided"); N.J. CONST. of 1844, art. III, § 1 (referring to what is "herein expressly provided"); OHIO CONST. art. II, § 32 (referring to what is "herein expressly conferred"); OKLA. CONST. art. II, § 18 (conflicting provisions are "hereby expressly repealed"); S.C. CONST. art. X, § 6 (referring to what is "hereby expressly authorized"); TEX. CONST. of 1845, art. II (referring to "instances herein expressly permitted"); UTAH CONST. art. V, § 1 (referring to "cases herein expressly directed or permitted").

139 Is the omission of "expressly" from the Federal Constitution a good argument that the Federal Constitution is not a text? John Marshall argued that the omission of "expressly" from the Tenth Amendment counsels for a broader construction of federal power than that allowed under the Articles of Confederation. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405–06 (1819). However, Marshall's point was that Congress could employ powers implied by those which were set out explicitly, not that the Constitution was not itself a text. The lack of an expression like "expressly in this Constitution" in the Federal Constitution means that I must look elsewhere to assess the meaning of the phrase "this Constitution," but it is not itself a reason to think that the Constitution is not a text.

140 U.S. CONST. art. I, § 1 (emphasis added).

141 *Id.* art. I, § 8, cl. 18 (emphasis added).

(in Article I, Section 1) and "by this Constitution" (in the Sweeping Clause). That would only make sense if "here" and "this Constitution" refer to the same entity—the text.

The Eighteenth Amendment likewise uses the two indexicals "this" and "here" to refer to the same action, in effect saying "here is this article." Manufacture, sale, and transportation of alcohol is "hereby prohibited,"[142] says Section 1, but Section 3 says that unless ratified in seven years, "[*t*]*his article* shall be inoperative."[143] Because the "operative" part of the amendment is in Section 1, "this article" does what is done "hereby." The text tells us, "Here is this article."

The use of indexicals like "here" to express spatial relationship of bits of the Constitution does not fit with either of the two historical, nontextualist forms of constitutional ontology. Purposes and expectations about applications exist in the minds of framers or others, not "here," in the text. Neither purposes nor expected applications are related by words like "foregoing" or "preceding."

2. "Enumeration in the Constitution"

The Ninth Amendment has been much discussed as a source or recognition of unenumerated rights. Without resolving that debate, I only want to point out a simple feature of the Amendment that confirms that the Constitution itself is a text. The Amendment refers to "the enumeration *in the Constitution* of certain rights."[144] The Constitution therefore must be the sort of entity that can enumerate rights—that is, list them textually. An ultimate purpose, or an expected application, cannot contain an enumeration; only a text can do that.

Of course, much remains to be said about what exactly the Ninth Amendment means. But it plainly confirms, and does not contradict, the proposition that the Constitution contains an enumeration of rights—that is, that the Constitution itself is textual. It is consistent with a fully textual Constitution that judges have the power to consider unenumerated rights, for instance, in construing statutes, or in construing what "proper" means in the Sweeping Clause, or even in striking down legislation.[145] The Ninth Amendment does not say that

142 *Id.* amend. XVIII, § 1 (repealed 1933).

143 *Id.* amend. XVIII, § 3 (repealed 1933) (emphasis added).

144 *Id.* amend. IX (emphasis added).

145 Even if unenumerated rights were superior to statutes, they might be distinct from the Constitution and subordinate to it. The textual Constitution might then take first place, unenumerated rights second, and legislation third. Such an arrangement would not make unenumerated rights literally part of what "the Constitution" refers to, but would only cause uneumerated rights to rank higher than legislation.

the Constitution is not a list; it actually confirms that the Constitution *is* a textual list, but forbids that list from being interpreted in a particular way. State constitutions contain similar "enumeration" language regarding "this Constitution."[146]

3. Engrossing "This Constitution" on Parchment

The Maine Constitution of 1819 makes perfectly plain that "this Constitution" is the text: "This constitution shall be enrolled on parchment, deposited in the secretary's office, and be the supreme law of the State, and printed copies thereof shall be prefixed to the books containing the laws of this State."[147] The Oklahoma Constitution of 1907 provides similarly,[148] as does the New Hampshire Constitution of 1784 regarding "this form of government."[149] The material

146 *See* ALASKA CONST. art. I, § 21 (referring to "[t]he enumeration of rights in this constitution"); *id.* art. XII, § 8 ("The enumeration of specified powers in this constitution shall not be construed as limiting the powers of the State."); ARIZ. CONST. art. II, § 33 (referring to "[t]he enumeration in this Constitution of certain rights"); *id.* art. II, § 2.1(E) (referring to "[t]he enumeration in this constitution of certain rights for victims"); COLO. CONST. art. II, § 28 (referring to "[t]he enumeration in this constitution of certain rights"); HAW. CONST. art. XVI, § 15 (referring to "[t]he enumeration in this constitution of specified powers"); ILL. CONST. art. I, § 24 (referring to "[t]he enumeration in this Constitution of certain rights"); *id.* art. II, § 2 (referring to "[t]he enumeration in this Constitution of specified powers and functions"); MICH. CONST. art. I, § 23 (referring to "[t]he enumeration in this constitution of certain rights"); MONT. CONST. art. II, § 34 (same); N.M. CONST. art. II, § 23 (same); OKLA. CONST. art. II, § 33 (same); *id.* art. II, § 34, cl. D (referring to "[t]he enumeration in the Constitution of certain rights for victims"); S.C. CONST. art. I, § 24(c) (same).

147 ME. CONST. art. X, § 6 (amended 1875, 1950, and 1967). The current language provides:

> And the draft [of the Constitution], and arrangement, when approved by the Legislature, shall be enrolled on parchment and deposited in the office of the Secretary of State; and printed copies thereof shall be prefixed to the books containing the laws of the State. And the constitution, with the amendments made thereto, in accordance with the provisions thereof, shall be the supreme law of the State.

Id.

148 OKLA. CONST. sched., § 43 ("When this Constitution shall have been ratified by the people of the State of Oklahoma and the State admitted into the Federal Union, under the same, as engrossed on parchment and signed by the officers and members of this Constitutional Convention, it shall be filed in the office of the Secretary of State and sacredly preserved by him, as the fundamental law of the State of Oklahoma.").

149 N.H. CONST. of 1784, part II, art. 101 ("This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land, and printed copies thereof shall be prefixed to the books containing the laws of this State in all future editions thereof.").

accompanying the copy of the original Montana Constitution of 1889 speaks of the "annexed and foregoing Constitution" being a "transcript," plainly a text.[150] Again, I find no reason to think that these usages of "this Constitution" are idiosyncratic; in lieu of such evidence, the federal "this Constitution" seems plainly to be a text as well.

4. "This Constitution" as Composed of Language

Several constitutions make clear that "this constitution" is composed of language, by speaking straightforwardly of terms "used in this constitution."[151] The Mississippi Constitution speaks of amendments being "inserted as a part of this Constitution,"[152] which would only make sense if the Constitution is textual; purposes or expected applications are not "inserted," only language. The New Jersey Constitution refers to a "paragraph becoming part of this Constitution."[153] If "this Constitution" is the sort of thing that can contain terms and paragraphs, it is a text.

5. "This Constitution" Performing Actions "Expressly"

Many state constitutions refer to "this Constitution" doing things "expressly"—that is, textually, through linguistically expressed mean-

150 MONT. CONST. of 1889 (attestation clause of Secretary of State Walker) ("I, Louis A. Walker, Secretary of the Territory of Montana, do hereby certify that I have compared the *annexed and foregoing* Constitution of the State of Montana, as adopted by the Montana Constitutional Convention of 1889, with the original thereof, filed in my office on the 17th day of August, A. D. 1889, and that the same is a correct *transcript* therefrom, and of the whole of said original Constitution." (emphasis added)).

151 ALASKA CONST. art. XII, § 3 ("Service in the armed forces of the United States or of the State is not an office or position of profit as the term is used in this constitution."); *id.* art. XII, § 10 ("Personal pronouns used in this constitution shall be construed as including either sex."); *id.* art. XII, § 11 ("As used in this constitution, the terms 'by law' and 'by the legislature,' or variations of these terms, are used interchangeably . . . ."); ARIZ. CONST. art. VI.1, § 5 ("The term 'judge' as used in this article . . . ."); HAW. CONST. art. XIV, § 12 ("Whenever any personal pronoun appears in this constitution, it shall be construed to mean either sex."); KY. CONST. § 208 (repealed 2002) ("The word corporation as used in this Constitution . . . ."); N.M. CONST. art. VII, § 2 (referring to "wherever the masculine gender is used in this Constitution"); PA. CONST. sched., § 33 (referring to "[t]he words 'county commissioners,' whenever used in this Constitution"); W. VA. CONST. art. VI, § 32 (referring to "[w]henever the words, 'a majority of the members elected to either House of the Legislature,' or words of like import, are used in this Constitution").

152 MISS. CONST. art. 15, § 273.

153 N.J. CONST. art. VIII, § 2, para. 6 (referring to indebtedness incurred "prior to this paragraph becoming part of this Constitution").

ing.[154] The Articles of Confederation do the same regarding "this Confederation."[155] If "this Constitution" refers to the same sort of entity in both state constitutions and the federal one, then the Federal Constitution is clearly a text.

---

154 *See, e.g.*, ALA. CONST. art. III, § 43 (referring to "the instances in this Constitution hereinafter expressly directed or permitted"); ARK. CONST. art. XIX, § 6 (referring to cases "expressly directed or permitted by this constitution"); *id.* art. XIX, § 9 ("The general assembly shall have no power to create any permanent State office not expressly provided for by this constitution."); COLO. CONST. art. III (powers separated "except as in this constitution expressly directed or permitted"); *id.* art. XIV, § 6 (1902) (amended 2000) (making exception "as hereafter otherwise expressly directed or permitted by constitutional enactment"); DEL. CONST. of 1831, sched., § 10 ("[N]o office shall be vacated by the amendment to this constitution, unless the same be expressly vacated thereby."); FLA. CONST. of 1885, art. II, § 1 (1962) (referring to "cases expressly provided by this constitution"); FLA. CONST. of 1838, art. II, § 2 (referring to "the instances expressly provided in this constitution"); IDAHO CONST. art. II, § 1 (referring to what is "in this Constitution expressly directed or permitted"); IND. CONST. art. II, § 9 (referring to what is "in this Constitution expressly permitted"); *id.* art. III, § 1 (referring to what is "in this Constitution expressly provided"); IND. CONST. of 1816, art. XI, § 13 (referring to what "in this Constitution is expressly permitted"); KY. CONST. § 60 (referring to what is "expressly provided in this Constitution"); MICH. CONST. art. III, § 2 (referring to what is "expressly provided in this constitution"); MICH. CONST. of 1908, art. IV, § 2 (referring to "cases expressly provided in this constitution"); *id.* art. V, § 9 (referring to "perquisites of the office not expressly authorized by this constitution"); *id.* art. X, § 11 (referring to "such debts as are expressly authorized in this constitution"); MICH. CONST. of 1850, art. IV, § 15 (referring to "perquisites of office, not expressly authorized by this constitution."); *id.* art. XIV, § 7 (referring to "such debts as are expressly authorized in this constitution"); MICH. CONST. of 1835, art. III (referring to "such cases as are expressly provided for in this constitution"); MINN. CONST. of 1857, art. III, § 1 (referring to "instances expressly provided in this constitution."); MONT. CONST. art. III, § 1 (referring to what is "in this constitution expressly directed or permitted"); MONT. CONST. of 1889, art. IV, § 1 (same); NEV. CONST. art. III, § 1, cl. 1 (amended 1996) (referring to "cases expressly directed or permitted in this constitution"); N.J. CONST. art. III, § 1 (referring to what is "expressly provided in this Constitution"); *id.* art. IV, § 7, para. 11 (referring to "the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution"); N.M. CONST. art. III, § 1 (referring to what is "in this constitution otherwise expressly directed or permitted"); S.C. CONST. of 1868, art. IX, § 10 (referring to "debts as are expressly authorized in this Constitution"); W. VA. CONST. art. VIII, § 21 (referring to what is "expressly prohibited by this constitution"); WYO. CONST. art. II, § 1 (referring to what is "in this constitution expressly directed or permitted").

155 ARTICLES OF CONFEDERATION art. II (U.S. 1781) (reserving to the states "every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States").

D. Semi-Originalism: The Historically Confined, Nonintergenerational Constitutional Author

Of the seven possible competitor constitutional ontologies I consider here, I take the material above to exclude three of them—the nonbinding Constitution and the Constitution as original ultimate purposes or original tangible applications. The four theories that remain are forms of textualism—my theory of the Constitution as historic, textually expressed sense, and three theories that allow later evolution to attach meaning to the constitutional text, through either moral theorizing, common law processes, or linguistic evolution. I will highlight several factors that make very clear that "this Constitution" is a constituting that happens at the time of the Founding, not intergenerationally or with each successive moment. Combining such a historic-Constitution conclusion with the textualist lesson above reveals that the Constitution is a historic textual event, textually expressing meaning at a particular time—the Founding.

1. The Distinction Between "Ourselves" and "Our Posterity," and Ratifying Conventions as "We the People"

Justice Breyer contends that the preambulatory "We" refers to people today. "[The Framers] wrote a Constitution that begins with the words 'We the People.' The words are not 'we the people of 1787.'"[156] Breyer quotes Alexander Meiklejohn's parsing of the Preamble: "In those words it is agreed, and with every passing moment it is reagreed, that the people of the United States shall be self-governed."[157] Meiklejohn thus imagines people today acting as the constitutional author by speaking the Preamble each moment. Accordingly, he thinks that we today are the ones to attach meaning to the text of the Constitution.[158] Recall Jed Rubenfeld's similar argument that the preambulatory "We" is intergenerational: "If self-government is a generation-spanning project, there must be a generation-spanning subject of this project. This subject I call a people. . . . [T]he idea of an inter-generational 'people' is well known to American constitutional thought. The Constitution seems to claim such a people as its author."[159] The title of Justice Brennan's famous 1985 speech—"The Constitution of the United States: Contemporary Ratifi-

156 STEPHEN BREYER, ACTIVE LIBERTY 25 (2005).

157 MEIKLEJOHN, *supra* note 86, at 18, *quoted in* BREYER, *supra* note 156, at 25.

158 *See supra* note 86 and accompanying text.

159 Rubenfeld, *Reading*, *supra* note 93, at 1146. Rubenfeld then cites the Preamble. *Id.* at 1146 n.99.

cation"[160]—suggests a similar interpretation of Article VII. Taken seriously, contemporary ratification means contemporary constitutional authorship.[161]

The precise identity of "We the People" and their precise location in history is critical to an assessment of "this Constitution," because the Preamble says that "We the People . . . do ordain and establish this Constitution for the United States of America."[162] "We the People" are the ones who ordain and establish the Constitution. If, as argued above, being bound by the Constitution means being bound by the Constitution's *meaning*, and not just bound by the physical text, then the ordaining-and-establishing "We the People" must be the ones who attach meaning to that text.

So who are "We the People"? An intergenerational constitutional author does not fit with the actual words of the Preamble. The operative language is: "We the People . . . do ordain and establish this Constitution for the United States of America." However, among the purposes of the Constitution is "to secure the Blessings of Liberty to ourselves *and our Posterity*."[163] The distinction between "ourselves"—that is, the "We the People" who ordain and establish the Constitution—and "our Posterity"—that is, later generations—is in considerable tension with the idea of an intergenerational constitutional author. If the constitutional author were already intergenerational, and "We the People" were pronouncing the words of the Constitution over the entire course of American history, then there would be no need to refer separately to "our Posterity," because they would already be included within the constitutional author. Simply referring to "ourselves" would be sufficient, if Rubenfeld's reading of the Preamble were correct.[164]

Many state constitutions likewise refer to "ourselves and our posterity."[165] Several state constitutions make the distinction between the

160 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

161 In fairness to Brennan, he does not give any exegesis of the idea in his title, and it is difficult to tell how literally he takes it.

162 U.S. CONST. pmbl.

163 *Id.* (emphasis added).

164 Randy Barnett briefly alludes to a similar reading of the Preamble based on the "our posterity" reference, though he does not use the point to argue that the constitutional author includes only the Founders. *See* BARNETT, *supra* note 103, at 20 n.22 ("[I]n the Preamble to the Constitution, the framers did not purport to *bind* their posterity but rather to secure for it 'the Blessings of Liberty.'").

165 *See, e.g.*, ALA. CONST. pmbl. (stating that the purpose is to "secure the blessings of liberty to ourselves and our posterity"); ALA. CONST. of 1819, pmbl. (stating that the purpose is to "secure to ourselves and our posterity the rights of life, liberty, and

constitutional author and later generations more explicit, referring to "this generation," "succeeding generations,"[166] "present and future

property"); ARK. CONST. pmbl. ("We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of Government; for our civil and religious liberty; and desiring to perpetuate its blessings and secure the same to ourselves and our posterity . . . ."); ARK. CONST. of 1836, pmbl. (stating that the purpose is to "secure to ourselves and our posterity the enjoyment of all the rights of life, liberty, and property, and the free pursuit of happiness"); COLO. CONST. pmbl. (stating that the purpose is to "secure the blessings of liberty to ourselves and our posterity"); FLA. CONST. of 1865, pmbl. (stating that the purpose is to "secure to ourselves and our posterity the enjoyment of all the rights of life, liberty, and property, and the pursuit of happiness"); ILL. CONST. pmbl. (stating that the purpose is to "secure the blessings of freedom and liberty to ourselves and our posterity"); ILL. CONST. of 1818, pmbl. ("The people of the Illinois Territory . . . in order to . . . secure the blessings of liberty to themselves and their posterity . . . ."); IND. CONST. of 1816, pmbl. (stating that the purpose is to "secure the blessings of liberty to ourselves and our posterity"); LA. CONST. of 1868, pmbl. (same); ME. CONST. of 1819, pmbl. (stating that the purpose is to "secure to ourselves and our posterity the blessings of liberty"); MICH. CONST. pmbl. ("We, the people of the state of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity . . . ."); MINN. CONST. pmbl. ("We, the people of the State of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity . . . ."); N.C. CONST. pmbl. ("We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity . . . ."); OHIO CONST. of 1802, pmbl. (stating that the purpose is to "secure the blessings of liberty to ourselves and our posterity"); PA. CONST. of 1776, pmbl. ("[I]t is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity . . . ."); R.I. CONST. of 1842, art. I (stating that the purpose is "effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity"); S.C. CONST. of 1868, pmbl. (stating they were "forming a new Constitution of civil government for ourselves and posterity"); S.D. CONST. pmbl. (stating that the purpose is to "preserve to ourselves and to our posterity the blessings of liberty"); TEX. CONST. of 1868, art. 1 (stating that the purpose is that "great principles of liberty and equality [be] secured to us and our posterity"); WYO. CONST. of 1889, pmbl. ("We, the People of the State of Wyoming, grateful to God for our civil, political and religious liberties, and desiring to secure them to ourselves and perpetuate them to our posterity.").

166 *See, e.g.*, ALA. CONST. amend. 543, § 1(a) ("[T]his generation is a trustee of the environment for succeeding generations . . . ."); ALASKA CONST. pmbl. ("We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska."); ILL. CONST. pmbl. ("We, the people of the State of Illinois, grateful to Almighty God for the civil, political, and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a

generations,"[167] or "this and future generations."[168] Indexicals like "this generation" or "succeeding" or "future" as applied to generations make no sense spoken by an intergenerational author.[169]

Further, Article VII makes clear that the ratifying conventions at the time of the Founding are the ones who "establish" the Constitution: "The Ratification of the Conventions of nine States, shall be sufficient for the *Establishment of this Constitution* between the States so ratifying the Same."[170] The Preamble, moreover, identifies "We the People" as the ones who do the same thing—who "ordain *and establish this Constitution*."[171] According to the Preamble and Article VII, then, "We the People" are a collection of ratifying conventions. Article VII says that what the ratifying conventions do is "sufficient" for doing what the Preamble says that "We the People" do. Without conven-

---

blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations . . . ."); N.J. CONST. pmbl. ("We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same, unimpaired, to succeeding generations . . . ."); R.I. CONST. pmbl. ("We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations . . . .").

167 *See, e.g.*, ALA. CONST. amend. 543, § 1 (stating purpose "to protect the natural heritage of Alabama for the benefit of present and future generations"); HAW. CONST. art. XI, § 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources . . . ."); ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."); MONT. CONST. art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

168 *See, e.g.*, ALA. CONST. amend. 543, § 2(20)(b) (articulating the purpose "to protect the natural heritage and diversity of Alabama for future generations"); COLO. CONST. art. IX, § 10(1)(c) ("[T]he economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations."); MONT. CONST. pmbl. (articulating the purpose "to secure the blessings of liberty for this and future generations").

169 I should note one bit of contrary evidence here. A 1971 amendment to Pennsylvania's Constitution added a provision that makes clear that "the people" includes later generations. PA. CONST. art. I, § 27 (1971) ("Pennsylvania's public natural resources are the common property of all the people, *including generations yet to come*." (emphasis added)). It is not clear that "the people" here is the same as Pennsylvania's preambulatory "We, the people," but this is one bit of evidence at least suggesting an intergenerational people.

170 U.S. CONST. art. VII (emphasis added).

171 *Id.* pmbl. (emphasis added).

tions, there can be no "contemporary ratification" of the sort described in Article VII.[172] No additional later participation by later generations of "We the People" is required, according to Article VII and the Preamble, to establish "this Constitution" (and, obviously, to attach meaning to it). The relevant constituting thus happened at the Founding, not later.

A number of state constitutions make it fully explicit, usually in their preambles, that the constitutional author is the convention assembled at the time of the Founding.[173] In lieu of evidence that the

172 Contemporary ratification might serve some other purpose, of course—the Article VI oath is close to contemporary ratification—but it would not be literal Article VII contemporary ratification that would make people today the constitutional author.

173 *See, e.g.*, ALA. CONST. sched., § 6 ("Done by the people of Alabama, through their delegates in convention assembled in the hall of the House of Representatives, at Montgomery, Alabama, this the third day of September, Anno Domini, nineteen hundred and one."); ALA. CONST. of 1861, pmbl. ("We the People of the State of Alabama . . . being now by our representatives in Convention assembled . . . ."); ALA. CONST. of 1819, pmbl. ("We, the people of the Alabama Territory . . . assembled in convention at the town of Huntsville, on Monday, the fifth day of July, one thousand eight hundred and nineteen . . . ."); ARK. CONST. of 1836, pmbl. ("We, the people of the Territory of Arkansas, by our representatives in convention assembled, at Little Rock, on Monday, the 4th day of January, A.D. 1836 . . . ."); FLA. CONST. of 1865, pmbl. ("We, the people of the State of Florida, by our delegates in convention assembled, in the city of Tallahassee, on the 25th day of October, in the year of our Lord 1865 . . . ."); FLA. CONST. of 1838, pmbl. ("We, the People of the Territory of Florida, by our delegates in convention, assembled at the city of Saint Joseph, on Monday, the 3d day of December, A.D. 1838 . . . ."); ILL. CONST. of 1818, pmbl. ("The people of the Illinois Territory . . . do, by their representatives in convention . . . ."); IND. CONST. of 1816, pmbl. ("We the Representatives of the people of the Territory of Indiana, in Convention met, at Corydon, on Monday the tenth day of June in the year of our Lord eighteen hundred and sixteen . . . ."); KY. CONST. ordinance ("We, the representatives of the people of Kentucky, in Convention assembled . . . ."); KY. CONST. of 1792, pmbl. ("We, the representatives of the people of the State of Kentucky, in convention assembled . . . ."); LA. CONST. of 1861, pmbl. ("We, the People of the State of Louisiana, in Convention assembled . . . ."); LA. CONST. of 1812, pmbl. ("We, the Representatives of the People of all that part of the Territory or country ceded under the name of Louisiana . . . in Convention Assembled . . . ."); MD. CONST. of 1776, Declaration of Rights, para. XLII ("This Declaration of Rights was assented to, and passed, in Convention of the Delegates of the freemen of Maryland, begun and held at Annapolis, the 14th day of August, A.D. 1776."); MICH. CONST. of 1835, pmbl. ("In convention, begun at the city of Detroit, on the second Monday of May, in the year one thousand eight hundred and thirty-five: We, the people of the Territory of Michigan . . . ."); MISS. CONST. pmbl. ("We the people of Mississippi, in Convention assembled . . . ."); MISS. CONST. of 1817, pmbl. ("We, the representatives of the people, inhabiting the western part of the Mississippi territory . . . assembled in convention, at the town of Washington, on Monday, the seventh day July, one thousand eight hundred and seventeen . . . ."); N.Y. CONST. of 1777, pmbl. ("IN CONVENTION OF THE

nature of these states' constitutions is different from the nature of the Federal Constitution or of other states, we should conclude that the author of the Federal Constitution is likewise temporally confined to the time of the Founding. If a constitution that begins "We the People in convention assembled at [a particular place] on [a particular date]" has the same sort of nature as a constitution that begins simply "We the People," we should conclude that "We the People" means "We the People at the time of the Founding," especially when Article VII implies the same thing.

2. "Now" and the Historically Confined Constitution

A limit to the twenty-year protection of the slave trade in Article I, Section 9 makes explicit reference to the time at which the Constitution speaks:

> The Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[174]

The point of the "now existing" limitation was to allow Congress to prohibit the slave trade to new states even before 1808.[175] If a citizen of 1795 were to say "states now existing," he would include Kentucky, but a citizen of 1787 would not. Because the provision plainly applies to original slave states, but not to Kentucky, it is obvious that "now" refers to the Founding.

On a reading on which the Constitution is spoken today, or is enacted intergenerationally, the "now existing" language is nonsense. If we are continuously reenacting the words of the Constitution, and thereby expressing their contemporary meaning, then when we do so with the word "now," we refer to today, not the Founding. But if I am

---

REPRESENTATIVES OF THE STATE OF NEW YORK, *Kingston, 20th April, 1777* . . . ."); *id.* art. I ("This convention, therefore in the name and by the authority of the good people of this State . . . ."); *id.* art. II ("This convention doth further, in the name and by the authority of the good people of this State . . . ."); S.C. CONST. pmbl. ("We, the people of the State of South Carolina, in Convention assembled . . . ."); S.C. CONST. of 1868, pmbl. ("We, the People of the State of South Carolina, in Convention assembled . . . ."); S.C. CONST. of 1865, pmbl. ("We, the people of the State of South Carolina, by our delegates in convention met . . . .").

174 U.S. CONST. art. I, § 9, cl. 1 (emphasis added).

175 *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 7, at 274–75 ("[A] reference in the 1808 clause to 'the States now existing' . . . implicitly allowed Congress to ban transatlantic slave imports into new states even before 1808 . . . ." (quoting U.S. CONST. art. I, § 9, cl. 1)).

speaking an indexical like "now" at the same time that I am applying it, a "now existing" state is simply any state at all. Making sense of a document with "now" in it therefore requires distinguishing between the time of application and the time of authorship.[176] An intergenerationally authored, or continuously reauthored, Constitution would not sensibly use the term "now" to refer to the initial composition of the text. In using such a temporal indexical, the Constitution thus makes clear that it is historically confined to the Founding.

A review of state constitutions reveals a great many instances of the term "now" to refer to the time of their respective foundings.[177]

176 The Supreme Court similarly interpreted "now" in *Carcieri v. Salazar*, No. 07-526, slip. op. at 8–10 (U.S. Feb. 24, 2009) (stating that "now" in 1934 statute refers to 1934).

177 I have greatly abbreviated this list to include only the cases where "now" contributes in a significant way to the operation of a provision. *See, e.g.*, ALA. CONST. art. VI, § 167 (stating that restrictions on prosecutors "shall not operate to abridge the term of any Solicitor now in office"); ALA. CONST. of 1875, art. XI, § 8 (stating that constitutional reduction in salaries "shall not apply to any of said officers now in office"); ALA. CONST. of 1819, art. III, § 29 ("[T]he General Assembly shall make no appropriations previous to the year one thousand eight hundred and twenty-five, for the building of any other State House than that now provided for by law."); CONN. CONST. of 1818, art. X, § 3 ("All judicial and civil officers now in office . . . shall continue to hold their offices until the first day of June next . . . ."); DEL. CONST. sched., § 9 ("All the courts of justice now existing shall continue with their present jurisdiction, and the Chancellor and judges shall continue in office until the tenth day of June in the year one thousand eight hundred and ninety-seven . . . ."); DEL. CONST. of 1831, sched., § 5 ("All the courts of justice now existing shall continue with their present jurisdiction, and the chancellor and judges and the clerks of the said courts shall continue in office until the said third Tuesday of January, in the year of our Lord one thousand eight hundred and thirty-two . . . ."); DEL. CONST. of 1792, art. VIII, § 10 ("[A]ll actions and prosecutions now pending shall proceed as if this constitution had not been made."); FLA. CONST. of 1885, art. V, § 26, cl. 13 (1956) ("The provision for automatic retirement in Section 17 of this Article does not apply to any person now holding office."); FLA. CONST. of 1868, ordinances, no. 2 ("[A]ll persons now in confinement for the nonpayment of Taxes, shall be forthwith released . . . ."); IND. CONST. of 1816, art. XII, § 7 ("All suits, pleas, plaints and other proceedings now depending in any Court of Record or Justice's Court shall be prosecuted to final judgment and execution . . . in the same manner as is now provided by law, and all proceedings had therein in as full and complete a manner as if this Constitution were not adopted."); LA. CONST. of 1868, amend. XI (1878) ("For each district there shall be one district court, except in the parish of Orleans, in which the General Assembly may establish as many district courts as the public interest may require, not to exceed the number now authorized by existing laws, except by a two-thirds vote of all the members elected to both branches of the General Assembly."); ME. CONST. amend. XXIX (stating that literacy voting requirement "shall not apply . . . to any person who now has the right to vote"); MD. CONST. art. VIII, § 2 ("The system of Public Schools, as now constituted, shall remain in force until the end of the said first session of the General Assembly, and shall then expire, except so far as adopted or continued by the

In each of these instances, interpreting the state constitution as spoken intergenerationally or at the time of interpretation would plainly misinterpret, or make nonsense of, the provision.

The preamble to the South Carolina Constitution of 1778 includes "now" and "following" in describing the Constitution: "*Be it therefore constituted and enacted* . . . That the *following* articles, agreed upon by the freemen of this State, *now met in general assembly*, be deemed and held the constitution and form of government of the said State . . . ."[178] It is clear from this statement both that the Constitution is the text—that is, the language which is "following"—and that the Constitution speaks at the time of the Founding—that is, the time referred to by "now."

General Assembly."); MICH. CONST. of 1835, art. XII, § 7 ("No county now organized by law shall ever be reduced, by the organization of new counties, to less than four hundred square miles."); N.H. CONST. art. XI (1903) (stating that the literacy voting requirement "shall not apply . . . to any person who now has the right to vote"); N.J. CONST. art. I, § 8 ("No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment . . . ."); N.J. CONST. of 1844, art. VI, § VI, cl. 1 ("There shall be no more than five judges of the inferior court of common pleas in each of the counties in this State, after the terms of the judges of said court now in office shall terminate."); N.Y. CONST. of 1894, art. VI, § 12 (1909) (amended 1925) ("Those justices elected in the first and second judicial departments shall continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation as will make their aggregate compensation what they are now receiving."); N.Y. CONST. of 1821, art. I, § 16 ("[T]he governor, lieutenant-governor, senators and members of assembly, now in office, shall continue to hold the same until the first day of January, one thousand eight hundred and twenty-three, and no longer."); N.Y. CONST. of 1777, pmbl. (referring to resolution of "thirty-first day of May, now last past"); *id.* art. VII (providing for exemption to voting rules for "every person who now is a freeman of the city of Albany"); OKLA. CONST. art. XXII, § 1 (imposing a ban on alien land ownership that "shall not apply to lands now owned by aliens in this State"); PA. CONST. of 1873, art. IX, § 8 (regarding seven-percent-of-real-estate-valuation limitation on municipal debt, providing for exception for "any city, the debt of which now exceeds seven per centum of such assessed valuation"); *id.* sched., § 17 ("Nothing contained in this Constitution shall be held to reduce the compensation now paid to any law judge of this Commonwealth now in commission."); PA. CONST. of 1790, sched., § 8 (providing for meeting of judges of elections "at the house now occupied by David Miller" and "at the house now occupied by John Dickey"); R.I. CONST. of 1843, art. X, § 2 ("Chancery powers may be conferred on the supreme court, but on no other court to any greater extent than is now provided by law."); WASH. CONST. art. VI, § 1 (1910) (amended 1974) (stating that literacy voting requirements "shall not affect the rights of franchise of any person who is now a qualified elector of this state"); W. VA. CONST. art. X, § 1 (establishing exception for property tax limit "to pay the principal and interest of bonded indebtedness of the State now existing").

178 S.C. CONST. of 1778, pmbl. (second and third emphases added).

3. "The Time of the Adoption of This Constitution"

Article II, Section 1, Clause 5 provides: "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . ."[179] "The time of the Adoption of this Constitution" is obviously the time of the Founding. State constitutions likewise refer frequently to a particular time at which they are adopted.[180]

---

179 U.S. CONST. art. II, § 1, cl. 5.

180 *See, e.g.*, ALA. CONST. of 1819, art. VI, § 20 (requiring compilation of laws "[w]ithin five years after the adoption of this Constitution"); ALASKA CONST. art. VIII, § 11 (referring to "the date of ratification of this constitution by the people of Alaska"); *id.* art. XII, § 1 (referring to "the date of ratification of this constitution by the people of Alaska"); *id.* art. XV, § 1 (referring to "laws in force in the Territory of Alaska on the effective date of this constitution"); DEL. CONST. sched., § 18 (referring to "the time this Constitution shall take effect"); HAW. CONST. sched., § 2 (referring to "the time this constitution takes effect"); ILL. CONST. of 1870, sched., § 17 (referring to the time "[w]hen this constitution shall be ratified by the people"); *id.* sched., § 23 (referring to the time "[w]hen this constitution shall be adopted and take effect as the supreme law of the State of Illinois"); IND. CONST. sched., § 9 (amended 1984) (referring to the time "when this Constitution shall go into effect"); KY. CONST. ordinance ("We, the representatives of the people of Kentucky . . . do ordain and proclaim the foregoing to be the Constitution of the Commonwealth of Kentucky from and after this date."); LA. CONST. of 1812, art. IV, §11 (referring to the time "when this constitution goes into effect"); MD. CONST. of 1776, declaration of rights ("This Declaration of Rights was assented to, and passed, in Convention of the Delegates of the freemen of Maryland, begun and held at Annapolis, the 14th day of August, A.D. 1776."); *id.* conclusion ("This Form of Government was Assented to, and passed in Convention of the Delegates of the freemen of Maryland, begun and held at the city of Annapolis, the fourteenth of August, A. D. one thousand seven hundred and seventy-six."); MICH. CONST. art. VI, § 26 (referring to "the time this constitution becomes effective"); MISS. CONST. art. VI, § 159 (referring to the time "when this constitution is put in operation"); MONT. CONST. transition sched., § 4 (referring to the time "when this Constitution becomes effective"); N.H. CONST. of 1784, pt. II, art. XIII (referring to "seven years from the time this constitution shall take effect"); N.J. CONST. art. XI, § 1, cl. 3 (referring to "the time this Constitution or any Article thereof takes effect"); N.M. CONST. art. XIX, § 1 (amended 1911 and 1996) (referring to "two years from the time this constitution goes into effect"); N.Y. CONST. of 1846, art. XIV, § 2 (referring to the time "when this Constitution shall take effect"); N.C. CONST. of 1868, art. IV, § 25 (amended 1952 and 1954) (referring to the time "when this constitution shall go into effect"); N.D. CONST. art. XII, § 3 (referring to "the time this constitution takes effect"); OKLA. CONST. sched., § 23 (referring to "[w]hen this Constitution shall go into effect"); PA. CONST. of 1874, art. V, § 5 (referring to the time "when this Constitution shall be adopted"); S.C. CONST. of 1868, art. XIV, § 9 (referring to the time "when this Constitution goes into effect"); TEX. CONST. art. XVI, § 53 (repealed 1994) (referring to the time "when this constitution is adopted"); W. VA. CONST. of 1863, art. III, § 4 (referring to "the time this constitution goes into operation").

An intergenerationally adopted constitution could not use "*the* time of the adoption of this Constitution" as a particular time, as the Constitution does. If the Meiklejohn/Breyer theory is right, and the Constitution is really something "We the People" adopt today, then Arnold Schwarzenegger can actually be President, because he is a citizen today, at the time today's Constitution is adopted. If Rubenfeld's theory of the transgenerationally adopted Constitution were right, then it would make no sense to speak of a particular time at which a Constitution is adopted.

"This Constitution" is, then, located at the time of the Founding. The constituting of the United States happened at the Founding. It did not happen over generations and does not happen anew every day. The constitutional author distinguished itself from succeeding generations, identified its work of establishing the Constitution with the Founding's ratifying conventions, and spoke of the Founding as the time of its adoption. If we ask the Constitution what time it is—that is, what it means by the term "now"—it answers with the time of the Founding.

E. What About Amendments?

Article VI's "this Constitution" refers, of course, to the original Constitution, and presents its nature. There is, however, good reason to think that the amendments are the same sort of entity as the original Constitution presented in Article VI. Article V says that amendments become "valid to all Intents and Purposes, as *Part of this Constitution*."[181] If that is right, then it is hard to see how an amendment could be a fundamentally different sort of entity from the original Constitution. If the original Constitution is composed of language, it is hard to see how a later amendment's purpose or the expected applications of a later amendment could become "part" of it. Just as Article VII specifies the time of the ratifying conventions as the time at which the Constitution is "established,"[182] Article V says that amendments are "valid . . . *when ratified*."[183]

The Fourteenth Amendment contains three suggestions that it presents itself in the same manner that Article VI presents the original Constitution. The resolution proposing the amendment stated that "the *following* article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States."[184]

181 U.S. CONST. art. V (emphasis added).
182 *Id.* art. VII.
183 *Id.* art. V (emphasis added).
184 CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (emphasis added).

Because ultimate purposes and expected applications are not "following," only a text, this description supports textualism much as the original Constitution's cover letter does. Section 3 of the amendment disqualifies from office those who rebelled against the United States after taking an oath to support the Constitution—an emphatic enforcement of Article VI itself.[185] Section 5 says that Congress has power to "enforce . . . the provisions of this article."[186] "This article" seems to be self-referential in the same way as Article VI's "this Constitution," and Congress is to "enforce" it—characteristic of a command, rather than the sort of assessment to be revised in the manner of the common law.

Other uses of "this" in amendments suggest a constitutional ontology similar to that of Article VI. The Seventeenth Amendment says: "*This amendment* shall not be so construed as to affect the election or term of any Senator chosen before *it* becomes valid as *part of the Constitution*."[187] The amendment thus situates its validity at a particular point in time—just as "the time of the adoption of this Constitution" does for the original Constitution—and fits with Article V's language of amendments as parts of a single entity. As noted above, the Eighteenth Amendment equates what is done "hereby" with what is done by "this article."[188] It also says that "[*t*]*his article* shall be inoperative" unless it is ratified "within seven years from the date of the submission hereof to the States by the Congress."[189] Again, "this article" situates itself at a particular point in time—the time of ratification. The Twentieth and Twenty-Second Amendments likewise put "this article" at the time of ratification,[190] and the Thirteenth, Fifteenth, Eighteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments refer to the enforcement of "this article,"[191] again suggesting the same sort of constitutional ontology as Article VI's "this Constitution."

---

185 *See* U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President or Vice President . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . .").

186 *Id.* amend. XIV, § 5.

187 *Id.* amend. XVII, cl. 3 (emphasis added).

188 *See supra* text accompanying note 143.

189 U.S. CONST. amend. XVIII, § 3 (repealed 1933) (emphasis added).

190 *See id.* amend. XX, § 6 ("This article shall be inoperative unless it shall have been ratified . . . within seven years from the date of its submission."); *id.* amend. XXII, § 2 (same).

191 *Id.* amend. XIII, § 2; *id.* amend. XV, § 2; *id.* amend. XVIII, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

III. OBJECTIONS

A. Article VI As Tautological

Stephen Durden has criticized Kesavan and Paulsen's attempt to ground originalism in Article VI by relying on Alexander Hamilton's gloss on the Supremacy Clause in *Federalist No. 33*.[192] Durden argues that because the Constitution would be authoritative and supreme even without the Supremacy Clause, the Supremacy Clause cannot embed a theory of the Constitution's own nature and what should be supreme in constitutional interpretation.

However, even if Article VI restates a principle that is in some sense implicit in the very idea of a federal constitution—it would make little sense, for instance, to have a federal constitution but allow states to nullify it when they chose—Article VI does make that principle explicit. Further, it does so in a very specific way with the demonstrative phrase "this Constitution." Without such a clause, structural arguments like those in *Federalist No. 33* would still be available to show the supremacy of federal law. If Durden's interpretation of Hamilton's argument in *Federalist No. 33* is right that structural arguments could literally replicate the rule of Article VI, then such structural arguments would ultimately support textualist semi-originalism just as the arguments above do.[193] But Article VI means that we need

192 *See* Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections Are More Equal than Others*, 26 QUINNIPIAC L. REV. 337, 363 (2008); *see also* THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers."); *id.* at 204 ("A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.").

193 It is not obvious, however, that Hamilton claimed that *all* of Article VI is redundant. Rather, it appears Hamilton argued only the first clause—making "this Constitution" supreme over state law—was redundant. Hamilton's argument for redundancy never mentioned the oath provision, but rather revolved around the inherent nature of law as bestowing a government with specified powers. *See* THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 192, at 202–04. Certainly it has played an important role in fostering the actual contemporary culture of oath taking, if nothing else.

not go that route: our job in discerning the Constitution's theory of itself is confined to an analysis of the meaning of "this Constitution" in that Article. Indeed, even if something a bit different would emerge as supreme from the sort of structural arguments that we could employ if Article VI were omitted, Article VI *is* in the Constitution, and its assertion of what is supreme obviously trumps whatever would emerge from structural inference based on a constitution lacking Article VI.

Durden claims that the Kesavan-Paulsen argument "relies on the assumption that the Constitution is binding only because the Supremacy Clause says so."[194] However, there is no need to make such an assumption simply to view Article VI as establishing the Constitution's presentation of itself. There might be all sorts of *other* reasons to think that the Constitution is binding. The argument I present here only requires that *one* of them—and one embodied in officeholders' oaths today—is Article VI.

B. Circularity

By far the most frequent objection to constitutional self-definition is the claim that it would be viciously circular. Paul Brest, Frederick Schauer, Larry Tribe, Richard Fallon, David Strauss, and many others have argued that it is conceptually impossible for a Constitution to prescribe binding rules for its own interpretation or to specify its own nature. Because a constitution always depends on acceptance by the governing authorities to become law, the argument goes, its own *ipse dixit* is not enough. But if a constitution's own *ipse dixit* is not enough, then we should merely consult present norms of acceptance to discover the Constitution's nature. If present norms of acceptance allow court decisions, for instance, to count as "the Constitution," then it doesn't matter what Article VI says.

There are numerous examples of this argument. Paul Brest, for instance, says,

> [A]lthough article VI declares that the Constitution is the "supreme law of the land," a document cannot achieve the status of law, let alone supreme law, merely by its own assertion.
>
> . . . .
>
> . . . [I]t is only through a history of continuing assent or acquiescence that the document could become law. Our constitutional tradition, however, has not focused on the document alone, but on

194 Durden, *supra* note 192, at 367.

> the decisions and practices of courts and other institutions. And this tradition has included major elements of nonoriginalism.[195]

In his work on the nature of the Constitution, Sanford Levinson states: "[R]ecourse to 'the Constitution' as a source of guidance within our own polity simply begs the question of what counts as 'the Constitution' . . . . [A]ll suggested answers inevitably are circular. There is simply no way of referring *to* 'the Constitution' for a criterion of *what* 'the Constitution' is."[196] Similarly, Laurence Tribe says this in response to Justice Scalia's theory of the Constitution: "There is certainly nothing in the text itself that proclaims the Constitution's text to be the sole or ultimate point of reference—and, even if there were, such a self-referential proclamation would raise the problem of infinite regress . . . ."[197] After arguing that giving meaning to "this Constitution" requires looking outside the "four corners of the document," Frederick Schauer states:

> Yet, it would be misleading even to suggest that something in the Constitution *could* tell us to what 'this Constitution' refers. I now want to suggest that this is impossible. Suppose I were to draft a document entitled "The Constitution of the United States," granting all of the powers of governance over the territory known as "The United States of America" to me and thirty of my closest friends. And suppose I were to include within this document a provision specifying the condition for effectiveness (an analog to Article VII), to be the signing of this document by me and sixteen of the thirty named individuals. And suppose finally that sixteen of the named individuals and I did in fact sign the document in full compliance with *its* specified condition for its own effectiveness.
>
> Were all of this to take place, then there would exist in the United States two (or possibly more) documents, each purporting to be "The Constitution of the United States," and each fully effec-

195 Brest, *supra* note 3, at 225 (footnote omitted).

196 LEVINSON, *supra* note 5, at 36.

197 Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 79, at 77–78. The material canvassed above, of course, is my response to the first part of Tribe's comment, *see supra* Part II. He makes a similar argument again in LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 6 (2008) ("[N]othing in the visible text can tell us that what we are reading really *is* the Constitution, rather than an incomplete or otherwise inaccurate facsimile, or even a complete hoax. And even if we accept the copy in this book as accurate and complete, *it* cannot tell us—authoritatively, anyway—that it truly is the legitimate, binding, fundamental law of the United States, trumping all other sources of law. Oh, it *says* it's the 'supreme Law of the Land,' all right—right there in its own Article VI—but the fact that a text proclaims its own supremacy, while displaying confidence on the part of its authors and ratifiers, can't in itself *establish* that text as legitimate, much less as 'supreme.'").

> tive according to its own internally specified conditions for effectiveness. But it is equally clear that only one of these "Constitutions" would be *the* Constitution of the United States, because only one of these documents would have been accepted, socially and politically, by the people of the United States as their Constitution.[198]

Many other theorists have echoed Schauer's argument that present acceptance, not the Constitution's assertion, is dispositive of the nature of "the Constitution."[199]

I agree with part of the thrust of Schauer's argument. Present acceptance is a *necessary condition* for Article VI's claim about "this Constitution" to be successful. However, we should not confuse the necessary conditions for a claim to be successful with the full assessment of a claim itself. The fact that a car requires gasoline to run, and not just an engine, does not mean that we can understand a car by simply worrying about the proper gasoline, neglecting the design and function of the engine. Likewise, the fact that Article VI's claim to make "this Constitution" supreme must be accepted in order for it to be effective does not obviate the need to investigate what, exactly, that claim amounts to.

Consider four examples of instances in which an entity's own testimony is critical for assessing its nature. All of them show why we can

---

198 Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 51–52 (1994); *see also* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION 145, 152–53 (Sanford Levinson ed., 1995) (making the same argument).

199 *See, e.g.*, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 465 (2000); Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 125–27 (2003); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1128–29 & n.78 (2008); Fallon, *supra* note 102, at 545–46; Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on* Miranda *and* Dickerson, 45 N.Y.L. SCH. L. REV. 119, 133–35 (2000); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585–88 (2001); R. Stephen Painter, Jr., *Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?*, 36 SETON HALL L. REV. 125, 159 (2005); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 643 (2008); David A. Strauss, *What Is Constitutional Theory?*, 87 CAL. L. REV. 581, 583 & n.9 (1999); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1290–91 & n.225 (1995); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 421 (2007). One anonymous commenter lodged the circularity objection to a preview of this article's argument contained in an earlier article. *See* Posting of William to Books Do Furnish a Room, http://booksdofurnisharoom.blogspot.com/2007/07/philosophy-of-language-and-originalism.html (July 19, 2007, 1:59 EST) (considering Green, *supra* note 22).

neither simply accept self-testimony as uncontroversially true, nor dismiss it as irrelevant.

First, consider persons who tell us who they are and what they do. A constitution claiming to be the supreme law of the land is no more viciously circular than a person claiming to be a janitor. It is true that non-janitors can claim to be janitors, and non-constitutions can claim to be the Constitution. But if someone tells me, "I'm a janitor," then he either *is* a janitor or has a job that does not require perfect honesty. Those who make false claims about their jobs are not, in general, to be taken seriously.[200] Taking the Constitution seriously, to the point of swearing an oath to support and defend it, yet rejecting the specific claims to supremacy embodied in the meaning of "this Constitution," is incoherent. Anyone who claims to have sworn an Article VI oath, yet simultaneously claims to lack any obligation to follow Article VI's definition of "this Constitution," contradicts himself.

Second, consider Federal Rule of Evidence 902.[201] That rule recognizes that frequently we must rely on what documents say about themselves to assess their nature. "Extrinsic evidence of authenticity" is not required for twelve categories of document, including "[a] document bearing a seal purporting to be that of the United States,"[202] or "publications purporting to be issued by public authority."[203] McCormick explains the traditional rule embodied in Rule 902: "There are certain kinds of writing which are said to 'prove themselves' or to be 'self-identifying.' In consequence one of these may be tendered to the court and, even without the shepherding angel of an authenticating witness, will be accepted in evidence for what it purports to be."[204]

---

200 Compare C.S. Lewis' comments on Jesus' claim to be God:

> A man who was merely a man and said the sort of things Jesus said would not be a great moral teacher. He would either be a lunatic—on a level with the man who says he is a poached egg—or else he would be the Devil of Hell. You must make your choice. Either this man was, and is, the Son of God; or else a madman or something worse. You can shut Him up for a fool, you can spit at Him and kill Him as a demon; or you can fall at His feet and call Him Lord and God. But let us not come with any patronising nonsense about His being a great human teacher. He has not left that open to us. He did not intend to.

C.S. LEWIS, MERE CHRISTIANITY 54 (1952). It likewise makes little sense to accept the Constitution as somehow extremely important to our law, but reject its claim to make "this Constitution" supreme. Article VI does not leave that open to us.

201 FED. R. EVID. 902.

202 *Id.* 902(1).

203 *Id.* 902(5).

204 CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 186, at 397 (1954).

In short, the acceptance of documentary self-testimony is plainly not seen as perniciously circular when ordinary decisions are made about the admissibility of evidence. There is no reason to set a higher standard of finding a foundation for the identity of the Constitution.

Third, consider the parol evidence rule, which allows contracts to define the extent of the agreement between the parties through an integration clause.[205] Just after presenting his circularity argument, Tribe notes the apparent counterexample of the parol evidence rule. "Reading . . . integration clauses as decisive avoids the self-reference puzzle only because the authoritative nature of these clauses is thought to follow not from the contracts in which they appear but from the background contract law governing those documents."[206] True enough, an integration clause needs a court to enforce it in order to be effective. Article VI likewise needs people today to decide to actually agree to swear the oath it requires. But once we have a practice of enforcing integration clauses, we look to individual contracts to see if they have such clauses, and if so, exactly how those clauses are written. Likewise, once we have a practice of swearing the Article VI oath, officeholders who are part of that practice should consider themselves bound by the actual nature of the "this Constitution" such an oath makes supreme.

Fourth, the example of coups and self-crowning kings makes plain that we can make sense of self-authenticating assertions of authority. Schauer's example of his friends asserting an entitlement to govern the United States[207] is, of course, not seriously meant. If it were, it would be an attempt at a coup d'état. A Napoleanically self-crowning king is not incoherent. Those subject to such assertions of authority, seriously meant, must attend to their exact nature in order to decide how to oppose or work with them. It would be foolish to deal with a coup attempt by saying that the success of any assertion of authority depends on its acceptance, so we need not concern ourselves with what authority, exactly, the plotters are asserting. Likewise, we cannot say that the details of the Constitution's assertions about itself do not matter, merely because they must be accepted in order to be effective.

---

205 *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS §§ 3.3–3.4, at 130–40 (5th ed. 2003).

206 Tribe, *supra* note 197, at 78 n.24.

207 *See supra* note 198 and accompanying text.

Conclusion

The Federal Constitution embodies, I have claimed, a theory of its own nature. Examining other uses of "this Constitution" and other indexical language elsewhere in the Federal Constitution and in state constitutions can help us see that the Constitution presents itself as a historically situated text—that is, a text whose meaning was attached to it at the time of the Founding. Those who swear the Article VI oath should therefore be textualist semi-originalists who take the historic textually expressed sense as interpretively paramount.